

**FROM RIGHTS TO RESOURCES :
THE SOUTHERN FEDERAL DISTRICT COURTS AND THE TRANSFORMATION OF CIVIL
RIGHTS IN EDUCATION, 1968-1974**

by

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By 1968, the court ordered civil rights “revolution” was at a crossroads. More than a decade after *Brown v. Board of Education*¹ had called for school desegregation, few schools were even marginally integrated.² Southern opposition to desegregation, combined with a lack of direction from the Supreme Court, had left the lower federal courts unwilling, or unable, to demand rapid action. Stagnation resulted.³

This situation would change. Seemingly out of nowhere, and in a very short period of time, the federal courts transformed the concept of civil rights, taking it in a new and expansive direction almost impossible to predict a mere decade before. Reinterpreting a mix of government laws, regulations and past judicial orders, the courts, along with other branches of the federal government, began to reallocate social and economic resources such as access to education, jobs, political power and housing away from the majority toward the social margins.⁴ By 1974, a system of government-ordered, race and gender-based, redistributive remedies to the problems of the past was in place.⁵ The years immediately following saw a maturation of this system. The result transformed American society and politics as group affiliation, rather than individual worth, became the defining standard in public life.⁶

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¹ 347 U.S. 483 (1954).

² J. HARVIE WILKINSON, III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 101 (1976); Billy G. Bridges, *The Forty Year Fight to Desegregate Public Education in the Fifth Circuit and In Particular Mississippi*, 16 MISS. C. L. REV. 289, 306-07 (1996). For a discussion on compliance with *Brown*'s order to desegregate among the school districts that made up the *Brown* case, see generally RAYMOND WOLTERS, THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION (1984).

³ See generally WILKINSON, *supra* note 2; WOLTERS, *supra* note 2.

⁴ See generally HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY (1990); ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992).

⁵ Kull, *supra* note 4, at 191.

⁶ See generally TERRY EASTLAND & WILLIAM J. BENNETT, COUNTING BY RACE: EQUALITY

One should not underestimate the impact of this shift in public policy after 1968. While the civil rights' movement's traditional dream of a color-blind Constitution had often been just that -- a dream -- the *formal* emphasis prior to 1968 had been on protecting individual rights through the medium of a generally status-blind access to law.⁷ The goal was the implementation of equality through the removal of race as an issue of public consideration, and most civil rights laws and decisions were formulated -- at least technically -- to achieve that end.⁸

The problem, as both civil rights reformers and the courts soon discovered, was that merely having a "right" to something was not in itself enough to assure equal treatment under the law. Nor was access to a court of law an adequate remedy if the courts were unable, or unwilling, to provide adequate solutions to the problems faced by disadvantaged groups. Rights without effective remedies are meaningless rights, and that was exactly the situation many Americans found themselves in by 1968.

The source of this disjunction between rights and results was twofold. The first lay in the problems posed by the opposition to civil rights by many white Americans, especially, though not solidly, in the South.⁹ Few in the South accepted the Supreme Court's offer in *Brown II*¹⁰ of a voluntary process of desegregation in 1955, and this position of "massive opposition" to civil rights reforms continued into the 1960s.¹¹ The law might have been on the side of the plaintiffs in desegregation suits, but the advantages in the desegregation fight usually lay with the defendant school districts which had the money, the legal talent and the public backing necessary to place significant roadblocks in the way of the district judge's implementation of an effective

FROM THE FOUNDING FATHERS TO *BAKKE* AND *WEBER* (1979); LINO A. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS*, at chs. 5-7 (1976) (providing a much more negative view on this transformation).

⁷ For a discussion of movement's formal and judicial advancements, see KULL, *supra* note 4, at chs. 9-10.

⁸ RICHARD POLENBERG, *ONE NATION DIVISIBLE: CLASS, RACE AND ETHNICITY IN THE UNITED STATES SINCE 1938*, at 237 (1980).

⁹ For a discussion on Southern opposition to *Brown*, see generally NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S* (1969); MICHAL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH* (1987); J. W. PELTASON, *58 LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION* (1961); ROBERT A. PRATT, *THE COLOR OF THEIR SKIN: EDUCATION AND RACE IN RICHMOND, VIRGINIA, 1954-89*, at 6-9 (1992); FRANK READ AND LUCY MCGOUGH, *LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH* (1978).

¹⁰ 349 U.S. 294 (1955).

¹¹ See *supra* note 9 and accompanying text.

desegregation plan (where the judge was willing to take such an action in the first place).¹² The methods used by those opposed to desegregation were simple and effective: If a case could be won on its merits, then stall the process for as long as possible.¹³ This process was exactly what occurred in most southern districts. And, as early desegregation suits in Dallas, Atlanta, and New Orleans showed, the result was that little if any real desegregation had occurred by 1968.¹⁴

Of equal importance in minimizing the effectiveness of the early civil rights laws and decisions were the limits built into the civil rights process by the Supreme Court.¹⁵ Most civil rights decisions prior to 1968 focused on the political and social manifestations of discrimination. As Chief Justice Earl Warren noted in *Brown*,¹⁶ the high court viewed “the evil of racial discrimination” as arising out of the feelings of “inferiority as to their status in the community” generated within the “hearts and minds” of the African-American.¹⁷ It was this sociological effect of segregation, “amply supported by modern authority,” that mandated the Court’s decision in *Brown*.¹⁸ “We conclude,” the Chief Justice had intoned for the unanimous Court, “that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal” and thus violative of the equal protection clause of the Fourteenth Amendment.¹⁹

This approach had the advantage of flexibility. By stopping short “of holding unconstitutional all racial classifications by government as impermissibly color-conscious per se, . . . the Court was able to maximize its newly claimed authority and jurisdiction while minimizing limitations on its discretion in enforcing its decree and affording remedies” in the face of popular opposition.²⁰ Yet “the price of unanimity . . . was deliberate ambiguity,” and in 1954, unanimity on the Court was deemed essential if any action on civil rights was to be achieved.²¹

¹² PELTASON, *supra* note 9, at chs. 3-4 (providing examples of this process).

¹³ *Id.*

¹⁴ *See, e.g.*, *Bell v. Rippey*, 133 F. Supp. 811 (N.D. Tex. 1955); *Bell v. Rippey*, 146 F. Supp. 485 (N.D. Tex. 1956); *Calhoun v. Members of Bd. of Educ.*, 188 F. Supp. 401, 402 (N.D. Ga. 1959); *Bush v. Orleans Parish Sch. Bd.*, 1 RRLR 306, 308 (E.D. La. 1963).

¹⁵ WILKINSON, *supra* note 2, at 64-68. One of the great ironies of this ambiguity in *Brown*, as we shall see, was that it permitted the federal courts to shift within a fifteen year period from ordering that no student may be assigned to a school because of their race to mandating the assignment of students based solely on race -- without having to formerly overturn the *Brown* “doctrine.” As written, *Brown* could permit either interpretation. EASTLAND & BENNETT, *supra* note 6, at 123.

¹⁶ 347 U.S. 483 (1954).

¹⁷ *Id.* at 494.

¹⁸ *Id.* at 494.

¹⁹ *Id.* at 495.

²⁰ GRAHAM, *supra* note 4, at 368.

²¹ *Id.* at 370; *see also* Dennis J. Hutchinson, *Unanimity and Desegregation:*

This approach had the disadvantage, however, of ignoring the important economic sources of discrimination. Poverty, in equal partnership with racism, stood in the way of blacks' efforts at improving their lives in the 1960s. As civil rights strategist Bayard Rustin noted in February 1965:

More Negroes are unemployed today than in 1954, and the unemployment gap between the races is wider. The median income of Negroes has dropped from 57 per cent to 54 per cent of that of whites More Negroes attend *de facto* segregated schools today than when the Supreme Court handed down its famous decision. . . . And behind this is the continuing growth of racial slums, spreading over our central cities and trapping Negro youth in a milieu which, whatever its legal definition, sows an unimaginable demoralization These are the facts of life which generate frustration in the Negro community and challenge the civil rights movement. At issue, after all, is not *civil rights*, strictly speaking, but social and economic conditions.²²

The civil rights movement, as shaped by the *Brown*²³ decision's logic, Rustin concluded, had only attacked "institutions which [were] relatively peripheral both to the American socio-economic order and to the fundamental conditions of the Negro people."²⁴

This failure to correct the social and economic as well as legal foundations of discrimination was a primary factor fueling change in civil rights after 1968. The reality in black lives was that "the residents of Harlem and Watts already enjoyed equality before the law," it simply did them little good.²⁵ By the late 1960s, the same could be said for an African-American in the newly (if technically) desegregating South. Equal rights under the law were not making a fundamental difference in their actual lives, and this failure was becoming more and more important to those affected by the twin burdens of discrimination and poverty.

The primary effect of this expanding gap between rights and results was a growing pressure from minority communities (first the black and then others) to make effective the rights promised by the civil rights revolution, to shift the priority in civil rights away from "equal treatment" toward "equal results."²⁶ The courts and government, Bayard Rustin argued, needed to be concerned with "not merely . . . removing the barriers to

Decisionmaking in the Supreme Court, 1948-1958, 68 GEO. L. REV. 1 (1979).

²² KULL, *supra* note 4, at 183 (quoting Rustin). For Rustin's full comments, see Bayard Rustin, *From Protest to Politics: The Future of the Civil Rights Movement*, 39 COMMENTARY 25 (1965).

²³ 347 U.S. 483 (1954).

²⁴ KULL, *supra* note 4, at 183 (quoting Rustin).

²⁵ *Id.*

²⁶ *Id.* at 183-91.

1999]

FROM RIGHTS TO RESOURCES

full *opportunity* but with achieving the fact of *equality*.”²⁷ Daniel Patrick Moynihan, then Assistant Secretary of Labor, concurred.²⁸ “[T]he demand of Negro Americans for full recognition of their civil rights” had been met.²⁹ “A new crisis in race relations [was] approaching. In this new period the expectations of the Negro Americans will go beyond civil rights. Being Americans, they will now expect that in the near future equal opportunities for them as a group will produce roughly equal results, as compared to other groups.”³⁰

The growth of the Black Power movement in 1966 and 1967 symbolized the growing frustration within the black community over the gap between rights and results.³¹ As Stokely Carmichael noted in an essay entitled “What We Want,” published in *The New York Review of Books* in September 1966, “Black Power . . . begin[s] with the basic fact that black Americans have two problems: they are poor and they are black.”³² Any reform that did not solve for these twin evils was doomed to failure. Sadly, this had been the case with the civil rights movement which had up to then focused exclusively on issues of race.

[I]ntegration speaks not at all to the problem of poverty, only to the problem of blackness. . . . Integration, moreover, speaks to the problem of blackness in a despicable way. As a goal, it has been based on complete acceptance of the fact that *in order to have* a decent house or education, blacks must move into a white neighborhood or send their children to a white school. This reinforces, among both black and white, the idea that “white” is automatically better and “black” is by definition inferior. This is why integration is a subterfuge for the maintenance of white supremacy.³³

“The reality,” Carmichael concluded “is that this nation, from top to bottom, is racist.”³⁴ Was it any wonder that each time blacks “saw Martin Luther King get slapped, they became angry; when they saw four little black girls bombed to death, they were angrier; and when nothing happened, they were steaming”?³⁵ The civil rights movement “had nothing to offer . . . [the black community], except to go out and

²⁷ Rustin, *supra* note 22, at 27.

²⁸ U.S. DEPARTMENT OF LABOR, OFFICE OF PLANNING AND RESEARCH, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965), *reprinted in* LEE RAINWATER & WILLIAM L. YANCY, *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY* 39 (1967).

²⁹ *Id.* at 43.

³⁰ *Id.*

³¹ See MANNING MARABLE, *RACE, REFORM AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945-1990*, at ch. 5 (2d ed. 1991) (discussing the Black Power movement between 1965 and 1970); POLENBERG, *supra* note 8, at 231-34.

³² STOKELY CARMICHAEL, *What We Want*, *THE NEW YORK REVIEW OF BOOKS* (1966), *reprinted in* *THE AGE OF PROTEST* 132 (Walt Anderson, ed., 1969).

³³ *Id.* at 135-36 (emphasis in original).

³⁴ *Id.* at 140.

³⁵ *Id.* at 131.

be beaten again.”³⁶ What was needed, if this failure of reform was to be overcome, was for “[b]lack people . . . to win political power, with the idea of moving on from there into activity that would have economic effects.”³⁷ Ultimately, “the economic foundations of this country” had to be “shaken if black people [were] to control their lives.”³⁸ With real power, “the masses could *make or participate* in making the decisions which govern their destinies, and thus create basic change in their day to day lives.”³⁹ Without power, the evils of discrimination would only continue unchecked.⁴⁰

Carmichael and others in the Black Power Movement were skeptical that white society would grant such a redistribution of power and resources to blacks without a virtual revolution.⁴¹ Others in the black community, not to mention other minority groups, were willing to take the chance. Despite the seeming unwillingness of the federal district courts to push the civil rights laws into new areas of concern without the direct order of an appellate court, such requests were still being placed on district court dockets in ever growing numbers.⁴² In essence, those who filed such suits seemed to be saying, ‘meet our needs for equality of results, or face the anger and revolution represented by the Black Power movement.’

Yet whether the solution proposed involved revolution or reform, one thing was clear by the summer of 1968: rights without effective remedies could no longer fulfill the ambitions of the black community. The frustration within this community over this gap between rights and results was becoming increasingly explosive; in the summers of 1966 and 1967, and especially following Martin Luther King’s assassination in April 1968, this frustration had finally exploded into violence.⁴³ In a four year period, hundreds of cities across the nation were engulfed for days at a time by the flames of urban unrest.⁴⁴ Hundreds of thousands of ghetto residents took part in these riots; 60,000 of them were arrested for their actions; 10,000 were seriously injured; about

³⁶ *Id.*

³⁷ *Id.* at 132.

³⁸ *Id.* at 135.

³⁹ *Id.* at 132 (emphasis in original).

⁴⁰ *Id.*

⁴¹ See generally STOKELY CARMICHAEL, BLACK POWER: THE POLITICS OF LIBERATION (1967).

⁴² Donald Horowitz notes how “[the school desegregation cases] created a magnetic field around the courts, attracting litigation in areas where judicial intervention had earlier seemed implausible.” DONALD HOROWITZ, THE COURTS AND SOCIAL POLICY 10 (1977). For the statistics of civil rights filings, see ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1960-1968).

⁴³ POLENBERG, *supra* note 8, at 234.

⁴⁴ See generally THE REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 35 (1968) (providing numerous examples of urban unrest and violence) [hereinafter COMMISSION ON CIVIL DISORDERS]; see also POLENBERG, *supra* note 8, at 234.

1999]

FROM RIGHTS TO RESOURCES

250 were killed.⁴⁵ Most riots were ended only by the application of massive military strength; in 1967, 32,000 national guardsmen and regular army soldiers were called out to suppress urban riots; in 1968 the number grew to 60,000.⁴⁶

These race riots had an important transformative effect on the political elite who ran the country and on their attitudes toward race relations and the problems of civil rights reform. Those at the top of the social and political hierarchy were deeply shocked by the scope of the riots. As few events before or since, the race riots “convinced policymakers at every level that something extraordinary had to be done to improve the lot of black Americans.”⁴⁷ They came to believe that traditional civil rights measures aimed at achieving color-blind access to law as a remedy for the ills of discrimination simply would not -- could not -- work anymore. The goal of a color-blind constitution was not abandoned, at least as a constitutional ideal; but events dictated that such ideals needed to be put off for the sake of social and political harmony.⁴⁸

The Kerner Commission, formed after the 1967 riots to explore the causes of the riots, crystallized this new perception into a call for action in its final report published in 1968.⁴⁹

[T]he development of a small but steadily increasing Negro middle class while the greater part of the Negro population is stagnating economically is creating a growing gap between Negroes haves and have-nots.

This gap, as well as the awareness of its existence by those left behind, undoubtedly adds to the feelings of desperation and anger which breed civil disorders. Low-income Negroes realize that segregation and lack of job opportunities have made it possible for only a small proportion of all negroes to escape poverty and the summer disorders are at least in part a protest against being left behind and left out . . .

What the American economy of the late 19th and early 20th century was able to do to help European immigrants escape from poverty is now largely impossible. New methods of escape must be found for the majority of today’s poor.⁵⁰

The question, as always, was what “new” methods to use. The traditional methods associated with fighting poverty -- an expanded commitment to job creation, improved education and welfare supports -- were costly both in terms of financial and political capital. To make a real difference in the actual lives of minorities through such

⁴⁵ POLENBERG, *supra* note 8, at 234.

⁴⁶ *Id.*

⁴⁷ KULL, *supra* note 4, at 188.

⁴⁸ *Id.* at 188-89.

⁴⁹ *See generally* COMMISSION ON CIVIL DISORDERS, *supra* note 44, at 282.

⁵⁰ *Id.*

methods would require a serious expansion in the government's commitment to domestic spending.⁵¹ Sadly, with the war in Vietnam consuming larger and larger segments of the government's fiscal resources, such a call for a renewed and expanded war on poverty was unlikely to be funded.⁵² In addition, the traditional methods were time consuming. The lag between reform and results could sometimes take a generation; at its quickest, it still could take years to bring about visible results. This time frame was too long to wait in the tense days following the riots. As the Kerner Report concluded following the 1967 riots, "the vital element of time" was no longer available for long-term solutions.⁵³ Whatever new methods were found to solve the problems of race and poverty, they would have to be implemented quickly.⁵⁴

Into this gap strode the federal courts. "In the face of a sudden and universal conviction that the whole process would cost too much and take too long, it was inevitable that equality of results would come to be sought by different means."⁵⁵ Between the obvious, but unacceptable, alternatives of doing nothing or funding a massive expansion of welfare programs, lay the compromise of addressing the "results" of racism and poverty in minority lives through judicial action.⁵⁶ This plan had the advantage of limiting public expenditure by abandoning "the really expensive part of the traditional prescription -- substantial government intervention to alter the lives of the truly disadvantaged."⁵⁷ At the same time, judicial action offered the advantage of visible, immediate results, or at least the perception of visible, immediate results -- which, given the primary motivation behind this reform of muting minority frustration with poverty and racism, was an acceptable result to most white policymakers.

The effect, whatever the immediate causes or intended results, was an expanding commitment within the federal judicial hierarchy to use judicial powers to achieve

⁵¹ For an example of the political and practical difficulties associated with traditional reform methods, see ALAN J. MATUSOW, *THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960S*, at 217-21 (1984).

⁵² KULL, *supra* note 4, at 188-89; MATUSOW, *supra* note 51, at 169-75.

⁵³ COMMISSION ON CIVIL DISORDERS, *supra* note 44, at 281-82.

⁵⁴ *Id.* Despite its call for "new methods of escape" and its concerns for the need to act quickly, the Kerner Commission's final recommendations for government action were soundly based in the traditional methods of employment and welfare reform. KULL, *supra* note 4, at 188-89.

⁵⁵ KULL, *supra* note 4, at 189.

⁵⁶ It should be noted that a second alternative solution existed in the form of enhanced administrative reform carried out by the federal executive bureaucracy. Along with the solution offered by the federal courts, the administrative response would carry the load for civil rights reform after 1968. The description of this response is beyond the scope of this article. For a detailed and insightful description of the bureaucratic response, see generally GRAHAM, *supra* note 4.

⁵⁷ KULL, *supra* note 4, at 188-89.

1999]

FROM RIGHTS TO RESOURCES

“equality of results” in civil rights matters.⁵⁸ In a series of sweeping decisions, often in the face of public distrust and opposition, and with seemingly little visible concern for the long-term effects of their actions, the federal courts once again stepped in where others chose not to act. Centering their initial efforts on education, but soon moving on to such topics as jobs, prison conditions and political rights, these courts began to restructure American society.⁵⁹ Surprisingly, given their initial unwillingness to demand significant structural change following *Brown*,⁶⁰ but perhaps understandable given the tense context of the day, they chose to do this through the medium of race-based reallocation of resources -- what Andrew Kull has dubbed “benign racial sorting” and Hugh David Graham the “compensatory theory of preferential discrimination.”⁶¹

The effect of this shift in Civil Rights enforcement priorities away from the individual toward the group -- and from color-blind nondiscrimination to preferential (i.e. color-based) discrimination -- was explosive.⁶² The concept that an individual had valid claims on the public realm for enhanced access to social, economic and political resources based not only on their own personal merits, but also on their group affiliations, produced a radical re-orientation in American law and in the way most Americans lived their everyday lives.⁶³ Suddenly, one’s standing in the community depended as much on one’s membership in a particular sub-group of the society as their own skills, morals and actions.⁶⁴ As applied by the federal courts, those long on

⁵⁸ See generally DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* (1995).

⁵⁹ For a good summary of the changes brought by court order after 1968, see GRAHAM, *supra* note 4, at 375-85. For educational reform, compare WILKINSON, *supra* note 2, with GRAGLIA, *supra* note 6 (Graglia gives a more negative view of education reform). On job discrimination see, HERMAN BELZ, *EQUALITY TRANSFORMED: A QUARTER-CENTURY OF AFFIRMATIVE ACTION* (1991). For prison reform, see BRADLEY STEWART CHILTON, *PRISONS UNDER THE GAVEL: THE FEDERAL COURT TAKEOVER OF GEORGIA PRISONS* (1991); LARRY W. YACKLE, *REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM* (1989). On voting rights, see *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990* (Chandler Davidson & Bernard Grofman, eds. 1994); ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* (1987).

⁶⁰ 347 U.S. 483 (1954).

⁶¹ GRAHAM, *supra* note 4, at 370; KULL, *supra* note 4, at ch. 11 (chapter entitled “Benign Racial Sorting”).

⁶² Large numbers of studies exploring the impact of the post-*Brown* civil rights revolution on American society have been published. Evaluations have varied as to whether the changes have been positive or negative, however, all agree that the effects were both significant and long lasting. See generally ARMOR, *supra* note 58; EASTLAND & BENNETT, *supra* note 6; NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* (Harvard University Press, 1987); GRAGLIA, *supra* note 6; WOLTERS, *supra* note 2.

⁶³ See *supra* note 62.

⁶⁴ See generally TERRY EASTLAND, *ENDING AFFIRMATIVE ACTION: THE CASE FOR*

the outside of American life could now successfully make demands on the government, the courts and society as a whole, for enhanced access to schools, jobs, or other rights.⁶⁵ This meant a whole new way of doing business not only for the government, but for all Americans.⁶⁶ The ramifications of this shift have been felt to the present.

The point here is not whether the shift to group-based remedies in civil rights was a good or a bad thing for the nation. Judgements as to the proper standards and methods for distributing social, economic and political resources across the many segments of the nation are a matter of personal interpretation and conscience. Strong arguments for or against group-based remedies can be, and have been, made by many commentators and critics.⁶⁷ What is significant here is that it was the federal courts which chose to act in these matters and, largely on their own, initiate a policy shift of such magnitude. That they chose to act in this particular sweeping manner -- that they chose to act at all -- is both surprising and ironic given the federal courts prior history.⁶⁸

It is even more surprising and ironic that much of the construction of this shift lay within the district courts. The vast majority of federal district judges were white, upper-class members of the power elite of this nation.⁶⁹ Most, even where they were not segregationist or racist, questioned their role in civil rights matters.⁷⁰ As they saw it, their job as federal district judges was primarily focused on economic matters and concerns. Protecting property, and promoting economic expansion so more people

COLORBLIND JUSTICE (1996).

⁶⁵ GRAHAM, *supra* note 4; KULL, *supra* note 4, at ch. 11.

⁶⁶ See generally Graham, *supra* note 4; KULL, *supra* note 4, at ch. 11.

⁶⁷ For critiques of preferential discrimination, see ARMOR, *supra* note 58; KIRSTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988); EASTLAND, *supra* note 64; EASTLAND & BENNETT, *supra* note 6; GRAGLIA, *supra* note 6. For positive descriptions of this process, see LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994); DEREK BOK & WILLIAM G. BOWEN, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998).

⁶⁸ On the federal court's relationship, or lack of relationship, to matters of civil rights and liberties prior to *Brown*, see JOHN BREMAN, *BEFORE THE CIVIL RIGHTS REVOLUTION: THE OLD COURT AND INDIVIDUAL RIGHTS* (1988). See generally RICHARD KLUGER, *SIMPLE JUSTICE* (1975).

⁶⁹ See ROBERT CARP & RONALD STIDHAM, *THE FEDERAL COURTS 97-99* (1985); see generally Kermit Hall, *The Children of the Cabins: The Lower Federal Judiciary, Modernization, and the Political Culture, 1789-1899*, 75 NW. U. L. REV. 423 (1980); SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 58-59, 104-5, 147-9, 189-91, 227-9, 276-8, 338-40 (1997). On the makeup of the federal bench as a whole, see BICENTENNIAL COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, *JUDGES OF THE UNITED STATES* (2d ed.1983).

⁷⁰ See generally PELTASON, *supra* note 9.

1999]


FROM RIGHTS TO RESOURCES

could own private property was their priority.⁷¹ For years these judges had procrastinated in enforcing the mild changes called for by *Brown*.⁷² Now, suddenly, under the prompting of the Supreme Court, they would take the lead in transforming the very foundations of our society.

And take a lead they did. For while the goal of producing visible results in civil rights matters came quickly, as did the commitment in the appellate courts to extreme solutions, the *application* of status-based methods of enforcement would come piecemeal out of the district courts in response to enforcement difficulties in integration and other civil rights cases. Making an affirmative commitment to promote racial mixing in the schools or on the job was one thing, pulling it off in practice was another thing entirely. It was in response to the practical difficulties in complying with Supreme Court directives to promote immediate integration that a model for a system of group-based remedies was found and applied. This model, based in large part on enforcement tools found in the federal court's traditional economic caseload and powers, and adopted by most district judges in integration matters, provided the district courts with a familiar set of procedures capable of satisfying the Supreme Court's demands for immediate action and the minority community's demand for visible results.

Such compliance came with a price, however. For implicit within the business enforcement model lay a commitment to group-based remedies. In fact, once the basic components of this model was adopted, the shift to a group-based, results oriented jurisprudence was, if not inevitable, hard to stop. In this regard, education cases in the district courts, with their many practical enforcement problems, served as a proving ground for subsequent reorientations of American society though judicial ordered reforms.

1. The Supreme Court (Finally) Speaks: The Shift From Desegregation to Integration

⁷¹ The above view of the lower federal judiciary is the conclusion of a larger study being conducted by the author. Complete citations of this trend are beyond the scope of this article. However, for a general view of the district bench and their attitudes toward their role as judges, see generally TONY FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY (1979); TONY FREYER, HARMONY AND DISSONANCE, THE SWIFT AND ERIE CASES IN AMERICAN FEDERALISM (1981); EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958 (1992); CHARLES ZELDEN, JUSTICE LIES IN THE DISTRICT: THE U.S. DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, 1902-1960 (1993). 

the nature and content of district court caseloads, see ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES (1870-1939); ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1940-PRESENT); see also David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65 (1981).

⁷² *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954); see generally ANTHONY LEWIS, PORTRAIT OF A DECADE: THE SECOND AMERICAN REVOLUTION (1964); PELTASON, *supra* note 9; J. WILKINSON, *supra* note 2.

The shift toward race-based civil rights in education began quickly in the tense days following the start of urban unrest. It began at the middle level of the judicial pyramid, the Circuit Courts of Appeals, which voiced for the first time the federal court's growing commitment to equality of results.⁷³ The initiative then moved up the judicial ladder to the Supreme Court -- which soon expanded upon the circuit court's approach, creating in the process a mandate for immediate action in school desegregation matters.⁷⁴ Concurrently, questions of enforcement were returned to the district courts, which faced the many problems of implementing in the real world context the policies handed down from above. Enforcement problems, in turn, forced district judges to produce innovative solutions to meeting the problems of race. The Supreme Court's subsequent response to these solutions then generated new and expansive civil rights policies, which once again generated new enforcement problems. And so the pattern went on and on, until, unexpectedly and largely unintentionally, a revolution in civil rights law in education occurred.

In just over a single year, in four cases⁷⁵ authored by Fifth Circuit Judge John Minor Wisdom, the concept that any "classification based on race is inherently discriminatory and violative of the Equal Protection Clause of the Fourteenth Amendment,"⁷⁶ was replaced by the understanding that "the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration."⁷⁷ In practical terms, this shift in emphasis created a positive duty on the part of school boards to officially classify students in regards to their race as a means to integrate their schools at all costs. "The time has come for foot-dragging public school boards to move with clarity toward desegregation," Judge Wisdom decreed.⁷⁸ The sole question needing to be resolved in school cases was "how far have formerly *de jure* segregated schools progressed in performing their affirmative constitutional duty to furnish equal educational opportunities to all public school

⁷³ See *Singleton v. Jackson Mun. Separate Sch. Dist.*, 348 F.2d 729 (5th Cir. 1965) (hereinafter *Singleton I*); *Singleton v. Jackson Mun. Separate Sch. Dist.*, 355 F.2d 865 (5th Cir. 1966) (hereinafter *Singleton II*); *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), *cert. denied sub. nom.*, *Caddo Parish Sch. Bd. v. United States*, 389 U.S. 840 (1967) (hereinafter *Jefferson I*); *United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385 (5th Cir. 1967), *cert. denied sub. nom.*, *Caddo Parish Sch. Bd. v. United States*, 389 U.S. 840 (1967) (hereinafter *Jefferson II*).

⁷⁴ See *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Carter v. West Feliciana Parish Sch. Bd.*, 396 U.S. 290 (1970).

⁷⁵ See *supra* note 73.

⁷⁶ *Dorsey v. State Athletic Comm'n*, 168 F. Supp. 149, at 151 (E.D. La, 1958) (Judge Wisdom writing for a three-judge court).

⁷⁷ *Jefferson I*, 372 F. 2d at 836, 869 (emphasis in original).

⁷⁸ *Singleton I*, 348 F.2d at 729.

children?”⁷⁹ The only acceptable answer to this question, in turn, was a “school desegregation plan. . . that works.”⁸⁰ And, in Judge Wisdom’s view, any plan that did not completely eradicate the existing dual-system of education was an inadequate answer; “Faculties, facilities and activities as well as student bodies must be integrated.”⁸¹

These four circuit court cases,⁸² which have been called “the most important doctrinal change[s] in interpretation” of integration, “since *Brown* itself,”⁸³ lay the groundwork for the Supreme Court’s adoption of integration as the primary goal in school cases in *Green v. County School Board*.⁸⁴ The *Green*⁸⁵ case arose out of a fact situation which perfectly exemplified the post-*Brown*⁸⁶ failures of desegregation.⁸⁷ New Kent County, a small rural county in eastern Virginia with very little residential segregation and its student population almost evenly divided between white and black, had two schools.⁸⁸ Prior to *Brown*,⁸⁹ the school on the east side of the county had been exclusively for whites, while that on the west was for blacks.⁹⁰ Following *Brown*, this racial split continued almost unchecked. In 1965, a freedom-of-choice desegregation plan was imposed by the Eastern District of Virginia.⁹¹ However, under this plan, no white students had ever chosen to attend the black school, and only 15 per cent of the district’s black students transferred to the formerly all-white school.⁹²

Writing for a unanimous court, Justice William Brennan found against the school district.⁹³ The “pattern of separate ‘white’ and ‘Negro’ schools in the New Kent County school system established under compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the laws,” wrote Brennan.⁹⁴ The 1965 desegregation plan had not

⁷⁹ *Jefferson I*, 372 F.2d at 896.

⁸⁰ *Id.* at 847.

⁸¹ *Id.* at 868.

⁸² *See supra* note 73.

⁸³ Frank T. Read, *Judicial Evolution of the Law of School Integration Since Brown v. Board of Education*, 39 LAW & CONTEMP. PROBS. 7, 20 (1975).

⁸⁴ *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

⁸⁵ *Id.*

⁸⁶ *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

⁸⁷ *See Green*, 391 U.S. at 435, 437-40.

⁸⁸ *Id.* at 432.

⁸⁹ 347 U.S. 483 (1954).

⁹⁰ *Green*, 391 U.S. at 432.

⁹¹ *Id.* at 433-34.

⁹² *Id.* at 441.

⁹³ *Id.* at 441-42.

⁹⁴ *Id.* at 435.

worked. The token desegregation of the past, which the Justice noted was only a first step in the creation of unitary, nonracial education system for all students, was not adequate to meet the dictates of *Brown*.⁹⁵ School authorities had “the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch”; the courts, in turn, had the affirmative duty to force this end where necessary.⁹⁶ The time for bold action had come, Brennan argued.⁹⁷ “The burden on a school board today,” he wrote, “is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.”⁹⁸ Anything less was unacceptable.

Brennan’s point was clear; effectiveness in achieving integration, judged largely in terms of numbers, was to be the new standard to be used in desegregation cases. Applying this new standard to the facts of the case in *Green*,⁹⁹ the Supreme Court ruled that “[f]reedom of choice’ is not a sacred talisman; it is only a means to a constitutionally required end -- the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end.”¹⁰⁰ Given the lack of effective integration in New Kent County, new methods were clearly called for.¹⁰¹

The High Court therefore remanded the case to the Fourth Circuit, expecting (or perhaps simply hoping) that the point had now been made and enforcement of immediate integration could be left in the hands of the district and circuit courts. The judges of these lower courts, however, had trouble believing that the Supreme Court meant exactly what it said in *Green*. Though they were to set about enforcing the Supreme Court’s dictates in these matters, they modified the meaning of “immediate” to minimize the disruptions which integration could bring to the education process.¹⁰² Yet the Supreme Court was unwilling to brook any modifications of its *Green*¹⁰³ order.¹⁰⁴ Thus, one year after its decision in *Green*,¹⁰⁵ in response not only to the willingness of the lower federal courts to accept delays in integration, but to the growing opposition to immediate integration by state school officials and within the federal executive branch,

⁹⁵ *Id.*

⁹⁶ *Id.* at 437-38.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 439.

¹⁰⁰ *Id.* at 440 (quoting *Bowman v. County Sch. Bd.*, 382 F. 2d 326, 333 (4th Cir. 1967) (Sobeloff, J., concurring)).

¹⁰¹ *Id.* at 441-42.

¹⁰² See WILKINSON, *supra* note 2, at 118-20.

¹⁰³ *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

¹⁰⁴ WILKINSON, *supra* note 2, at 120.

¹⁰⁵ 391 U.S. 430 (1968).

1999]

FROM RIGHTS TO RESOURCES

the Supreme Court made even more explicit its commitment to this end.¹⁰⁶ In two separate cases, *Alexander v. Holmes County Board of Education*¹⁰⁷ and *Carter v. West Feliciana Parish*,¹⁰⁸ the Supreme Court issued peremptory orders mandating immediate integration as the only proper response to continuing educational segregation, even when this entailed the relocation of hundreds of thousands of school children in the middle of the school year. In *Alexander*, an appeal from the Fifth Circuit which had bowed to political pressure to delay the integration of some thirty school districts in Mississippi, the Court held that “[T]he Court of Appeals should have denied all motions for additional time, . . . Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.”¹⁰⁹ *Carter*,¹¹⁰ which arose from the Fifth Circuit’s continued disbelief that the Supreme Court *really* meant what it said, was as emphatic an order as the High Court made: on appeal, the Court peremptorily reversed the Fifth Circuit with the comment to get on with the job at hand.¹¹¹

In the years to come, the Supreme Court would expand and contract on the reach of the doctrine of immediate and massive integration.¹¹² But, as far as the district courts were concerned the call to arms had been made. Like it or not, the focus had shifted in educational civil rights. Desegregation was not enough; the new goal was integration, and integration now.

2. New Burdens, Old Problems: Enforcing Integration in the Southern District Courts

The effect of this shift in the views of the federal judiciary’s appellate policy-makers placed a new and heavy burden on the district courts. It was a different burden, however, than the burden created by *Brown*.¹¹³ The burden of *Brown*¹¹⁴ grew out of the lack of direction given the district judge by appellate courts.¹¹⁵ *Brown II*,¹¹⁶ which had ordered

¹⁰⁶ For more on the growing frustration of Supreme Court with delays brought on by state opposition to immediate integration, see WILKINSON, *supra* note 2, at 120. For a different read on the Supreme Court’s mind set in these matters, but one that agrees that the High Court was in a mood to demand action, see GRAGLIA, *supra* note 6, at ch. 6.

¹⁰⁷ 396 U.S. 19 (1969).

¹⁰⁸ 396 U.S. 290 (1970).

¹⁰⁹ *Alexander*, 396 U.S. at 20.

¹¹⁰ 396 U.S. 290 (1970).

¹¹¹ *Id.* For a description of the politics behind *Alexander* and *Carter*, see READ & MCGOUGH, *supra* note 9, at ch. 13; GEORGE R. METCALF, FROM LITTLE ROCK TO BOSTON: THE HISTORY OF SCHOOL DESEGREGATION, at chs. 4-5 (1983).

¹¹² See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Keyes v. Denver Sch. Dist.*, 413 U.S. 189 (1973); *Millikan v. Bradley*, 418 U.S. 717 (1974); *University of California Regents v. Bakke*, 438 U.S. 265 (1978).

¹¹³ 347 U.S. 483 (1954).

¹¹⁴ *Id.*

¹¹⁵ Judge Frank Johnson of the Middle District of Alabama argued that the implementation

desegregation “with all deliberate speed,” placed the primary responsibility for implementing this desegregation with the district courts and then left these courts exposed to the resulting anger and frustrations of a community undergoing change. As J. Harvie Wilkinson put it, “*Brown II* . . . resembled nothing more than an order for the infantry to assault segregation without the prospects of air or artillery support.”¹¹⁷ Add to this fact that most of the infantry not only lacked enthusiasm for the job in the first place but disputed their very roles as infantry in these matters, and it should not be surprising that given a choice between bold action and procrastination, most federal district judges chose the latter path.¹¹⁸

The Fifth Circuit’s decisions in *Jefferson* and *Singleton* and the Supreme Court’s decisions in *Green*, *Alexander* and *Carter* lifted the district judges’ burden of isolation. The choice in desegregation suits had been taken out of the hands of district judges. Their job was to desegregate dual school districts through the method of immediate integration. No excuses would be accepted; no delays tolerated; and where necessary, the blame could be placed on the Supreme Court.

The *Green* decision meant that district judges could no longer ignore the demands for action made by plaintiffs in school desegregation cases. Yet, despite the explicitness of the new policy, many problems still remained. *Green*’s dismissal of the freedom-of-choice plan in New Kent raised the first problem. If a freedom-of-choice plan that had a fifteen per cent success rate (which was about as successful an integration ratio as could be found in the South) was not adequate enough to meet the burden of *Brown*,¹¹⁹ what was?¹²⁰ How much actual integration had to take place before the new standards were achieved? Secondly, and more importantly, what methods should the district courts use to achieve this end? In a footnote to *Green* the High Court suggested two

order in *Brown II* was inherently flawed. “That second decision was very, very general and said district courts should do it with deliberate speed. If they’d said, ‘you’re to start within one year with the first grade and add one grade each year,’ it would have all been done in twelve years.” JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH’S FIGHT OVER CIVIL RIGHTS 273 (1993) (quoting Judge Johnson). Political scientist J. W. Peltason agreed with this view noting that “[district] judges . . . do what they must . . . [but] they can hardly be expected on their own initiative to move against the local power structure. If their instructions from above are ambiguous, the ambiguity will be resolved to conform to the judge’s own convictions and the mores of his district.” PELTASON, *supra* note 9, at 12-13.

¹¹⁶ 349 U.S. 294 (1955).

¹¹⁷ WILKINSON, *supra* note 2, at 81.

¹¹⁸ For other examples of district judge discomfort with the job of ordering desegregation, see generally PELTASON, *supra* note 9.

¹¹⁹ 347 U.S. 483 (1954).

¹²⁰ For a discussion of the numbers game in *Green* and its implications for other districts across the South, see WILKINSON, *supra* note 2, at 115-17.

such methods as consolidating one white and one black school together -- “one site . . . serving grades 1-7 and the other . . . serving grades 8-12” -- and geographical zoning - with students attending integrated neighborhood schools.¹²¹ Yet New Kent was a rural county with a relatively little residential segregation.¹²² What methods would be required to achieve integration in urban areas where residential segregation made such neighborhood based plans inadequate to meet the remedies required by *Green*? How far would the district courts have to go in promoting “integration now?”

It was in facing these problems that the new burden on district judges was created.¹²³ Far from being an easy process, immediate integration proved to be a difficult endeavor, one that required constant effort and innovation on the part of the district courts. Further, even where the district courts proved innovative in finding solutions, the practical and procedural problems of integration often stood in the way of effective reform.

Consider the problem of white flight. Prodded by the Fifth Circuit, district judges throughout the South began to order the immediate integration of *de jure* segregated school districts.¹²⁴ The result, by 1971, was to make the South into the most integrated section in the nation.¹²⁵ Reaction against this integration was swift, however. In Mississippi, for example, white enrollment in those counties affected by court ordered integration dropped twenty-five percent between 1968 and 1970.¹²⁶ Some districts saw a ninety percent, and in one case, a one hundred percent drop in white enrollment.¹²⁷ In Clarendon County South Carolina, one of the five original school districts in *Brown*, ninety-nine percent of district’s white students transferred to a private, Baptist parochial school following a post-*Green* integration order.¹²⁸ The result, despite the federal courts best efforts to achieve the explicit intent of *Green* (integration), was that many black students remained in segregated schools, while in other cases, the percentage of

¹²¹ *Green v. County Sch. Bd.*, 391 U.S. 430, 442 n.6. (1968).

¹²² KULL, *supra* note 4, at 194.

¹²³ It should be noted that this burden was shared by the judges of the Fifth Circuit who, through appeals from the decisions of the district courts, heard over 166 desegregation cases. If anything, between December 1969 and September 1970, the burden on the judges of the Fifth Circuit was greater than that on any of the individual district judges who they were directing in these cases. On the workload of the Fifth Circuit, see Read, *supra* note 83, at 32 n.108.

¹²⁴ A summary listing of court orders to implement immediate integration following *Green* can be found in 2 LEON JONES, FROM BROWN TO BOSTON: DESEGREGATION IN EDUCATION, 1954-1974, at 1730 (1979).

¹²⁵ HEW estimates placed 44 percent of black pupils in majority white schools in the South by 1971 as compared to only 28 percent in the North and West. 118 CONG. REC. 564 (daily ed. Jan. 20, 1972) (statement of Sen. Stennis).

¹²⁶ WILKINSON, *supra* note 2, at 121.

¹²⁷ *Id.*

¹²⁸ WOLTERS, *supra* note 2, at 165.

race mixing was significantly less than it might otherwise have been.

Integration also proved to be a time consuming and complex process, the effects of which raised new problems for the district courts. Final solutions in a desegregation suit were little more than a hope. Often, by the time a district judge solved one problem, two new problems needing innovative solutions arose. The solutions to these problems, in turn, generated even more difficulties that needed to be solved. Such cases dragged on for years on a court's docket. Often, shifts in Supreme Court policy negated the solutions reached on the district level, or at the very least, promoted new appeals whose resolution put off, yet again, the ultimate conclusion of the case.¹²⁹ All this action was dependant, of course, on the willingness of the district judge to be innovative.

The nature and scope of the problems posed by enforcement of integration -- and some of the solutions attempted -- can be seen through the example of *United States v. Texas*.¹³⁰ The origins of *United States v. Texas*¹³¹ lay deep in East Texas where, more than a decade after *Brown*,¹³² segregated schools were still the norm.¹³³ The case initially involved two neighboring school districts, Daingerfield ISD and Cason ISD. Daingerfield's student population was mostly white; Cason's was predominantly black.¹³⁴ For years, the Daingerfield schools had accepted transfers of white students from the Cason ISD.¹³⁵ In 1968, the Department of Health, Education and Welfare's Office for Civil Rights informed Daingerfield school administrators that these transfers were in violation of the civil rights laws (Title VI of the Civil Rights Act of 1964) and decisions of the Supreme Court.¹³⁶ They ordered the school to stop accepting transfers.¹³⁷ The district did so.¹³⁸ Subsequently, white citizens in Cason responded by petitioning the state government to detach the white portions of Cason and annex it

¹²⁹ A clear example of these events can be found in *Green v. County School Board*, 391 U.S. 430 (1968).

¹³⁰ The most important of these decisions are: *United States v. Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970), *supplemented by* 330 F. Supp. 235 (E.D. Tex.), *aff'd as modified*, 447 F.2d 441 (5th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1971); *United States v. Texas*, 342 F.Supp. 24 (E.D. Tex. 1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972); *United States v. Texas*, 356 F.Supp. 469 (E.D. Tex. 1972), *aff'd*, 495 F.2d 1250 (5th Cir. 1974); *see also* FRANK R. KEMERER, WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY (1991); POLICY RESEARCH PROJECT REPORT, SCHOOL DESEGREGATION IN TEXAS: THE IMPLEMENTATION OF UNITED STATES V. STATE OF TEXAS (1982).

¹³¹ 321 F. Supp. 1043 (E.D. Tex. 1970).

¹³² 347 U.S. 483 (1954).

¹³³ KEMERER, *supra* note 130, at 118.

¹³⁴ *United States v. Texas*, 321 F. Supp. at 1046.

¹³⁵ *Id.* at 1048.

¹³⁶ KEMERER, *supra* note 130, at 117; *see also United States v. Texas*, 321 F. Supp. at 1048-50.

¹³⁷ KEMERER, *supra* note 130, at 117.

¹³⁸ *Id.*

1999]

FROM RIGHTS TO RESOURCES

to Daingerfield, which the state did.¹³⁹ The resulting expanded school district split the Cason ISD in half.¹⁴⁰ This meant that black Cason students had to be bused across Daingerfield school district lines to go to school.¹⁴¹ Such busing across district lines was contrary to Texas state law.¹⁴² It was also in direct violation of federal civil rights laws.¹⁴³

Investigating further, HEW officials soon found other examples of segregation though the medium of split white/black majority districts.¹⁴⁴ A number of these districts experienced similar boundary changes “which resulted in the removal of all, or virtually all, white children from the now all-black districts and the siphoning off of black students from neighboring districts with bi-racial enrollments.”¹⁴⁵ Since many of these schools received no federal funds (and under Title VI, HEW’s sole weapon against segregated schools was the termination of federal aid) the matter was referred to the Justice Department.¹⁴⁶

Attorney’s in that department’s Civil Rights Division soon found even more examples of a dual school systems contiguous with largely white districts throughout Texas.¹⁴⁷ In most cases, these all-black districts lacked the resources of white districts.¹⁴⁸ One such district, the all-black Jeddo District in Bastrop County outside of Austin, consisted of a one-room schoolhouse with two outhouses located on a remote dirt crossroad.¹⁴⁹ The District employed one teacher and a teacher’s aid.¹⁵⁰ Average attendance was fifteen students, the minimum required under state law to receive state financial aid.¹⁵¹ And, in order to meet this number, three black students were bussed from the neighboring all-white Smithfield ISD.¹⁵²

Convinced that a case by case approach would prove inadequate to meet the scope of the problem (not to mention take almost forever to litigate) Justice Department

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 118.

¹⁴⁵ *United States v. Texas*, 321 F. Supp. 1043, 1049 (E.D. Tex. 1970).

¹⁴⁶ KEMERER, *supra* note 130, at 117.

¹⁴⁷ *Id.* at 118.

¹⁴⁸ *Id.*

¹⁴⁹ *United States v. Texas*, 321 F. Supp. at 1050.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* (noting that of the nine all-black school districts that ultimately were included in the case, all but three had less than one hundred students); *see also* KEMERER, *supra* note 130, at 118.

lawyers sought to combine these cases into a single action.¹⁵³ They achieved this combination through the simple expedient of including both the State of Texas and the Texas Education Agency (TEA) in the complaint along with the offending school districts and associated school officials.¹⁵⁴ The complaint, filed in March 1970, justified this inclusion by arguing that the present system of inferior all-black school districts adjoining predominantly white school districts was the result of state action or inaction -- a violation of both the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. In particular, it argued that "the state of Texas, through the Texas Education Agency, ha[d] failed, as the chief supervisory body of public education in Texas . . . adequately to oversee and supervise the districts within the State so that no child [was] denied on the grounds of race the benefits of programs supported by federal funds."¹⁵⁵

This approach had the advantage of allowing the district judge to place the entire state education system under court order and thus facilitate a state-wide remedy. The question was, would the district judge accept this consolidated approach? The Justice Department's proposal was still a novel concept in 1970. Most prior desegregation suits had been limited to only a handful of school districts at most.¹⁵⁶ Few complaints had included state education agencies. Only a couple of recent decisions had included the state education system as a whole.¹⁵⁷ Further, this approach raised jurisdictional problems. Texas had four federal districts courts. The schools named in this suit (not to mention other school districts not named but included by virtue of the state's inclusion in this case) were spread out across all four districts. Tradition argued for the independence of individual district courts.¹⁵⁸ For one judge to assume authority over matters in another district was unprecedented. To do so in three other districts was unthinkable. Yet assuming authority was exactly what the plaintiffs asked the court to attempt.¹⁵⁹

Cognizant of the unique nature of their request, Justice Department lawyers had searched carefully for an appropriate district in which to file their case. Their choice was the Marshall Division of the Eastern District of Texas. They chose to file in this court for two related reasons. First, this particular division had only one judge presiding, which meant that they knew exactly who the judge hearing the case would

¹⁵³ *Id.*

¹⁵⁴ *United States v. Texas*, 321 F. Supp. at 1045.

¹⁵⁵ *Id.* at 1045-46.

¹⁵⁶ See generally JONES, *supra* note 124, at 1069 (providing abstracts of most desegregation judgements in education and showing examples of how most desegregation suits prior to 1970 were limited to a single school district).

¹⁵⁷ *E.g.*, *Lee v. Macon County Bd. of Educ.*, 292 F. Supp. 363 (M.D. Ala. 1968) (combining sixty-two Alabama school districts under a single class action desegregation order).

¹⁵⁸ See CARP & STIDHAM, *supra* note 69, at 25.

¹⁵⁹ *United States v. Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970).

1999]

FROM RIGHTS TO RESOURCES

be.¹⁶⁰ Second, that judge was William Wayne Justice, a liberal Johnson appointee known both for his pro-integration views and his willingness to apply extensively the powers of his court.¹⁶¹

It was a good choice on the plaintiff's part. Justice took civil rights problems, and the role of his court in providing solutions to those problems, very seriously.¹⁶² In a 1969 desegregation case, *United States v. Tatum ISD*,¹⁶³ filed soon after the judge took to the bench, Judge Justice had acted quickly when the Tatum school board suddenly backed out of an HEW approved integration plan. Within a week of the case being filed in his court, the judge produced and ordered implementation a new integration plan, one in complete compliance with the *Green* doctrine.¹⁶⁴ At a time when most district judges were still dragging their feet in desegregation matters, Justice's work was fast. Similarly, when a Nixon Administration policy shift away from supporting school-consolidation remedies in desegregation suits threatened the entire strategy of the Justice Department lawyers in *United States v. Texas*,¹⁶⁵ the judge would "order" these lawyers to continue with their present strategy ("though he understood, of course, that they would have represent whatever position the Justice Department approved").¹⁶⁶

¹⁶⁰ Most federal district courts are divided into separate divisions, each division holding court in a different city in the district. Usually, a district judge is assigned to be the resident judge in one of these division courts (though he can and often does hear cases in any of the other divisions in the district). Where more than one judge is assigned to a division, cases are divided up among the sitting judges randomly. This means that were only one judge is assigned to a division, that judge will hear all of the cases filed in that division, but where more than one judge sits, that judge will hear only a portion of the cases filed. Needless to say, litigants who want to know exactly which judge will hear their case will tend to seek out divisions with only a single judge assigned.

¹⁶¹ On Justice's background and judicial/political views, see KEMERER, *supra* note 130.

¹⁶² "The law is full of interstices" Judge Justice noted in a 1978 interview. Laura Richardson & Jo Clifton, *William Wayne Justice: An Interview*, TEXAS OBSERVER, January 20, 1978, at 5.

If the law is settled -- I'm a professional -- I'm going to decide the case just exactly the way the law reads. On the other hand, if there is some vacancy or gap, I try to take into consideration what the Supreme Court has said about 'the evolving standards of decency.' I think the law ought to be decent if it's nothing else. It ought to afford justice.

Id. This commitment to 'affording justice' made Judge Justice an exceptionally activist judge, one who -- on par with Judge Johnson of Alabama -- "was quite willing, even desirous, of doing what was right" for the plaintiff in a civil rights case. KEMERER, *supra* note 130, at 152 (quoting Peter Sandmann, plaintiffs' attorney in *Morales v. Turman*, 326 F. Supp. 667 (E. D. Tex. 1971)).

¹⁶³ 306 F. Supp. 285 (E.D. Tex. 1969).

¹⁶⁴ *Id.* at 287-88.

¹⁶⁵ 321 F. Supp. 1043 (E.D. Tex. 1970).

¹⁶⁶ KEMERER, *supra* note 130, at 119 (quoting Justice Department Lawyer, Alexander

Given this commitment to enforcing the Supreme Court's civil rights orders, the judge's decision in *United States v. Texas* came fully down on the side of the plaintiffs.

Testimony at the trial, the judge ruled, fully established the disparate and segregated nature of the defendant school districts.¹⁶⁷ Boundary changes, liberal student transfers policies and state support of small school districts had all resulted in "isolating racially homogeneous residential areas into formal political enclaves," entrenching existing patterns of segregation, and thus "insur[ing] its continuation after its legal basis was declared unconstitutional."¹⁶⁸ The result was the creation of dual school systems in violation of federal law.¹⁶⁹

Citing both *Brown II's*¹⁷⁰ mandate to the federal district courts to oversee the desegregation of dual school districts and *Green's*¹⁷¹ affirmative duty to take all steps necessary to eliminate racial discrimination "root and branch," Justice then took up the challenge posed by the plaintiff's initial complaint and fashioned a broad remedy designed to bring about state-wide integration.¹⁷² He achieved this end in two parts. First Justice ordered those school districts named in the original suit to collaborate with the TEA and the U.S. Office of Education to produce an integration plan that would assure both faculty and staff desegregation and the non-discriminatory assignment of students.¹⁷³ The judge then went on to place the primary responsibility for assuring school desegregation in all Texas school districts with the TEA.¹⁷⁴ He did this in part because of the expertise possessed by the agency, an expertise "this court did not possess."¹⁷⁵ But even more so, the judge placed this burden on the TEA because of the agency's past support of segregated dual school districts.¹⁷⁶ In essence, Justice sought to use the TEA to reform a situation it helped create and which only it, in large measure, could end. The TEA was therefore ordered to immediately halt all discriminatory inter-district transfer of students and district boundary changes.¹⁷⁷ Thereafter, the agency was ordered to work with HEW's office of education to reevaluate its policies.¹⁷⁸

Buek).

¹⁶⁷ *United States v. Texas*, 321 F. Supp. at 1051.

¹⁶⁸ *Id.* at 1050-51.

¹⁶⁹ *Id.* at 1052.

¹⁷⁰ *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

¹⁷¹ *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

¹⁷² *United States v. Texas*, 447 F.2d 441, 443 (5th Cir. 1971).

¹⁷³ *Id.*

¹⁷⁴ *United States v. Texas*, 321 F. Supp. 1043, 1056-57 (E.D. Tex 1970).

¹⁷⁵ *Id.* at 1057.

¹⁷⁶ KEMERER, *supra* note 130, at 119.

¹⁷⁷ *United States v. Texas*, 447 F.2d at 442-49.

¹⁷⁸ In all, Judge Justice specified eight areas of responsibility for the TEA: (1) to review and deny all transfer requests that fostered segregation; (2) to investigate school boundary changes for racial impact; (3) to examine annually school transportation routes to determine if

The judge made this ruling despite the fact that the TEA, though formally charged with overseeing the state's public school system, was in practice less a regulatory agency than an oversight committee facilitating local control over education (and thus had no real authority or power to desegregate the public schools).¹⁷⁹ Having facilitated both the creation and continued existence of an unconstitutional dual school system whatever its actual powers, the judge held the burden to desegregate the Texas schools was squarely on the back of the TEA.¹⁸⁰

The use of the TEA as an enforcement arm of the court proved to be a fateful choice in terms of achieving substantial integration. The TEA did not want the job. Its primary constituency lay with the offending school districts, and they strongly opposed the Court's order.¹⁸¹ Left alone, the TEA would never have chosen to promote integration; yet refusing to enforce the Court's order meant facing significant penalties. The result was lip-service by the TEA in favor of the order, while a steady pattern of delay and minor obstructionism undermined its effectiveness.¹⁸²

Take, for example, the order requiring the TEA to monitor all districts with a minority enrollment of 66 percent or greater.¹⁸³ In most years this meant some 200 school districts scattered across the state.¹⁸⁴ As per the judge's order, the Technical Assistance Division of the TEA dutifully checked each of these 200 schools. Considerable staff time and resources were spent on these annual studies, yet little good came of all this effort. Many of the 200 school districts were in effect unitary districts, with the students attending one school for any grade level or set of grades levels.¹⁸⁵ Others had such a large minority population as to make effective integration impossible without consolidation of school districts -- a remedy strongly opposed by the rural nature of these districts.¹⁸⁶ Still others were under separate court order, effectively out

they were discriminatory; (4) to evaluate extra-curricular activities for discriminatory bias; (5) to report discriminatory personnel practices to the commissioner of education; (6) to review annually those districts maintaining campuses with over 66 percent minority enrollment and to determine if those schools were in compliance with federal regulations; (7) to conduct a study of minority student needs; (8) to inform the faculty and staff of grievance and complaint procedures. *Id.* at 442-49.

¹⁷⁹ KEMERER, *supra* note 130, at 128.

¹⁸⁰ *United States v. Texas*, 330 F. Supp. 235, 249-50 (E.D. Tex. 1971); KEMERER, *supra* note 130, at 121.

¹⁸¹ KEMERER, *supra* note 130, at 121.

¹⁸² *Id.* at 128.

¹⁸³ *Id.* at 129.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

of the reach of the TEA.¹⁸⁷ In other words, of the 200 districts examined yearly by the TEA, only about one eighth to a quarter actually could benefit from state action.¹⁸⁸ Nevertheless, the TEA dutifully continued to do this unnecessary job. The result was wasted resources which could have been better utilized to help the districts that merited direction.¹⁸⁹

In retrospect the judge realized that placing the TEA in the role of enforcer of the Court's order was a mistake.

I imposed this burden on the Texas Education Agency without any form of monitoring because I believed the United States Department of Justice was going to stay very active and would perform the monitoring functions themselves. I anticipated that they would have someone down there most of the time checking TEA activities to see that the order of the court was complied with. However, it was about that same time that the Nixon administration began, and I noticed immediately a significant decline in enforcement activity. The administration and its Department of Justice did not have the same attitude toward school desegregation nor the earnestness that the prior administration had.¹⁹⁰

Seeking to rectify this mistake, Justice invited a number of Hispanic activist groups to appear as plaintiff-intervenor in the case.¹⁹¹ He hoped that they would provide the necessary oversight of the TEA's enforcement activities to assure compliance with the law. The judge was ultimately disappointed in the results, however. "The actions that [these activist groups] have taken through the years have been sporadic; there has been no day-to-day supervision or monitoring of the activities of TEA at all. Apparently, they do not have funds to do that, or even see the need to do so."¹⁹² The result was that by 1983, despite years of review by the TEA, significant pockets of segregation still remained in the Texas schools.

3. Exploring Enforcement Alternatives

The enforcement problems experienced by Judge Justice were not unique to Texas. Finding an effective means of making integration real in both form and effect was extremely difficult given the limits of the traditional enforcement tools available to a judge. The judge could make all the orders he wished, but if the various players in a

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* Kemerer provides data of this process for 1981. Of 196 districts above the 66 percent line, 95 were effective unitary districts, 45 had majority-minority populations, and 30 were under separate court order. This left only 26 districts for which annual reports could prove useful.

¹⁸⁹ *Id.*

¹⁹⁰ KEMERER, *supra* note 130, at 129-30 (quoting William Wayne Justice).

¹⁹¹ *Id.* at 130.

¹⁹² *Id.* at 129-30 (quoting Justice).

dispute chose to ignore these orders, or only provide lip-service, the court's dictates were meaningless: mere words irrelevant to the matters at hand. Nor was the threat of criminal or civil punishment always an adequate means of assuring compliance. Given the public nature of these matters, their extended time frame, the large number of people involved, and the general support government officials had in opposing integration, threats of punishment were often ignored with impunity. Even where the court backed up its threat of sanctions, this often had the perverse effect of creating martyrs and hence more opposition to compliance.¹⁹³ For integration to work, continual, hands-on court oversight was necessary to assure compliance. Yet, how could a court provide such oversight? The traditional conception of a court's functions involved providing a neutral forum "for settling disputes between private parties about private rights."¹⁹⁴ In this context, litigation was by nature simply a dispute between clearly identified parties over past events, initiated by the litigants, premised on evidence supplied by those parties and providing relief in direct proportion to the substantive violation in contention (i.e. the remedy must be in *direct* proportion to the *specific* wrong caused by the defendant).¹⁹⁵ Yet civil rights suits are nothing like this. Here, the issues in contention involve public policy, not private rights; the "party structure is sprawling and amorphous," rather than being clearly delineated; the issues in contention constantly change over the course of the litigation, as opposed to being fixed and enduring; and the remedial process is "suffused and intermixed with negotiating and mediat[ion]" rather than providing "one time, authoritative resolution" to wrongs wholly committed in the past.¹⁹⁶

Civil rights suits, in other words, turn the traditional conception of adjudication on its head, making enforcement problematic at best, impossible at worst. So, what enforcement options were available to a judge in such cases? One answer to this dilemma lay in a unique branch of the federal courts' private law experience: the equity/bankruptcy receivership.¹⁹⁷ Prior to the rise of the civil rights suit, questions of

¹⁹³ See generally Mark G. Yudof, *Implementation Theories and Desegregation Realities*, 32 ALA. L. REV. 441 (1981).

¹⁹⁴ Abram Chayes, *The Role of the Judge in Public Law Litigation*, quoted in AMERICAN LAW AND CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 413 (Lawrence Friedman & Harry Scheiber, eds., 1997).

¹⁹⁵ *Id.*

¹⁹⁶ Chayes, *supra* note 194, at 414; David L. Kirp & Gary Babcock, *Judge and Company: Court-Appointed Masters, School Desegregation, and Institutional Reform*, 32 ALA. L. REV. 313, 325-28 (1981).

¹⁹⁷ Bankruptcy and equity receiverships are not the same action, but are very similar in content and effect. A bankruptcy court is an equity court and both actions are part of the federal courts jurisdiction by virtue of the Constitution. U.S. CONST. art. I, § 8; U.S. CONST. art. III, § 2. However, bankruptcy requires a congressional statute to be put into force, while equity is an inherent part of the federal courts jurisdiction. Otherwise, bankruptcy and equity operate in a similar manner with the receivership function of equity and the trusteeship

bankruptcy, probate, trusts and creditor's rights provided some of the most troubling and complex issues for the federal courts.¹⁹⁸ As would be the case with civil rights actions, bankruptcy cases involved conflicting claims from a wide range of litigants to enormous amounts of varied resources. Under the Bankruptcy Act of 1898,¹⁹⁹ as well as general equity jurisdiction, any debtor could request bankruptcy proceedings and the appointment of a trustee on an application of insolvency.²⁰⁰ Also, any creditor owed a debt four months past due could request an involuntary bankruptcy. In either case, the courts would appoint a trustee or receiver to watch over, and if necessary, operate the estate of the bankrupt. In its earliest forms, such trusteeships/receiverships were only a means of maintaining a property before liquidating it; the receiver simply was a conservator for the creditors' interests. In the late Nineteenth century, however, the federal courts, in response to the economic necessity of some forms of property (such as railroads) for economic development, restructured the receivership concept, emphasizing reorganization and long-term productivity over immediate disposal of the property to pay off creditors.²⁰¹ This new type of receivership protected the company from its creditors, raised new capital through the selling of receiver's bonds and generally trimmed the debt that had caused the company to fail in the first place. The end goal of such receiverships was to return the company to its creditors renewed and financially sound while providing at all times its necessary economic services to the wider community. The result was to make the federal courts into partners with (or perhaps, better stated, guardians of) the failing company, overseeing, in the person of

function of bankruptcy providing essentially the same services. Though historically, there was a bias in Bankruptcy matters toward dissolution of the company for the benefits of its creditors while equity receiverships were used to rebuild the company and return it to its stockholders. However, bankruptcy receiverships could be used to rebuild and return a company from the brink of dissolution while equity receiverships could be used to dissolve a company where necessary. *See generally* Jaroslawa Zelinsky Johnson, Comment, *Equitable Remedies: An Analysis of Judicial Utilization of Neoreceiverships to Implement Large Scale Institutional Change*, 1976 WIS. L. REV. 1161.

¹⁹⁸ For a discussion of the complexities and the ways federal courts transformed the equity receivership in response to such complexities, see Albro Martin, *Railroads and the Equity Receivership: An Essay on Institutional Change*, 34 J. ECON. HIST'Y 685 (1974); *see also* Theodore Eisenberg & Stephan C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 482-86 (1980); Johnson, *supra* note 197, at 1168-69.

¹⁹⁹ 11 U.S.C. §§ 61-82 (1898), *repealed by* § 401(a) of Public Law 95-598.

²⁰⁰ *See generally* Charles Thomas Payne, *The General Administration of Equity Receiverships of Corporations*, 31 YALE L.J. 685 (1922); Warner Fuller, *The Background and Techniques of Equity and Bankruptcy Railroad Reorganizations-A Survey*, 7 LAW & CONTEMP. PROBS. 375 (1940). On Bankruptcy, *see* Graydon Staring, *Bankruptcy: An Historical View*, 59 TUL. L. REV. 1157 (1985); CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* (1935).

²⁰¹ On evolution of receiverships in 19th century, *see generally* Payne, *supra* note 200; FULLER, *supra* note 200.

the receiver or trustee, the day to day operation of the company for extended periods of time.²⁰²

To achieve these ends, the federal courts created a series of enforcement tools and/or procedures which extended well past the traditional conception of a court's proper role in litigation. Since economic reorganizations were often long-term processes, involving large numbers of litigants and interveners, the courts routinely retained jurisdiction in these matters following final judgement.²⁰³ Often, this retention of jurisdiction was matched with the implementation of a mandatory injunction demanding compliance with the Court's reorganization plan and outlining the penalties to be faced for non-compliance.²⁰⁴ This injunction, in turn, was often part of a detailed and sweeping decree outlining the basic premises of the reorganization plan (and sometimes the very steps to be taken in reorganizing).²⁰⁵ The court then had the choice of returning enforcement to those involved (i.e. using its final decree to set policies which a trustee, chosen by the company's stockholders or creditors, would follow in completing the actual reorganization) or of turning to independent experts to help in working enforcing remedial plans.²⁰⁶ This latter help usually came in the person of a receiver and/or special master appointed directly by the Judge, but could also come from expert witnesses and special interveners brought in to help in the formation of appropriate decrees, orders and/or oversight of the property.²⁰⁷

What all three types of judicial adjuncts provided was information and expertise.

²⁰² For an additional detailed description of the origins of receiverships as well as a discussion of the linkage between bankruptcy receiverships and Civil Rights suits, see generally Eisenberg & Yeazell, *supra* note 198; Johnson, *supra* note 197.

²⁰³ For a detailed description of this process, see Eisenberg & Yeazell, *supra* note 198, at 482-86; Johnson, *supra* note 197, at 1168-69.

²⁰⁴ Eisenberg & Yeazell, *supra* note 198, at 482-86; Johnson, *supra* note 197, at 1168-69.

²⁰⁵ Eisenberg & Yeazell, *supra* note 198, at 482-86; Johnson, *supra* note 197, at 1168-69.

²⁰⁶ In other words, trustees and receivers had essentially the same roles, the one major difference being that the trustee was picked by litigants themselves to watch over the reorganization, while receiver was chosen directly by the Judge. Often, this trustee was associated with the management of the company. Masters, or special masters as they were sometimes known, served as the court's fact-finders: conducting hearings on behalf of the court, determining questions of fact and of law, ruling on admissibility of evidence, conducting investigations, recommending sanctions and determining the value of property and damages. Often, Masters had the additional job of supervising trustees and receivers, reporting to the Judge as appropriate. Staring, *supra* note 200, at 1162; see generally Payne, *supra* note 200, at 685-701; William O. Douglas & J. Howard Marshall, *A Factual Study of Bankruptcy Administration and Some Suggestion*, 32 COLUM. L. REV. 25 (1932).

²⁰⁷ Frank M. Johnson, Jr., *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271, 274 (1981); Note, *Receiverships as a Remedy in Civil Rights Cases*, 24 RUTGERS L. REV. 115, 132 (1969); Eisenberg and Yeazell, *supra* note 198, at 482-86; Johnson, *supra* note 197, at 1168-69.

They were the judge's eyes, ears and hands. Judges were not businessmen, and they did not understand all the ins and outs of operating a particular business. The detailed explanations of the workings of the property provided by these adjuncts enabled the judge to make informed decisions. And, once that decision was made, they were available to either carry out or oversee its application.

Once appointed, receivers²⁰⁸ had a wide range of powers and authority over the company in receivership. Oversight of a receiver was often pro-forma.²⁰⁹ Since the primary goal of the Court in organizing a receivership was the continuation of bankrupt company's services, not the protection of its creditors, most receivers were given a free hand in operating the bankrupt company.²¹⁰ As early as the 1870s the federal courts had ruled that "all outlays of the receiver . . . made in good faith in the ordinary course of business . . . and with a view to advance and promote the road . . . are fairly within the line of discretion necessarily allowed him."²¹¹ Only in cases of "extraordinary" expenses would the court examine the receiver's actions.²¹² As to reorganization plans, the court's oversight was often limited to accepting or denying the finished plan.²¹³ Sometimes the courts would appoint a special master to hold hearings examining the receiver's requests to determine what were "ordinary" and what were "extraordinary" expenses or actions.²¹⁴ Yet, in as much as most receivers were chosen for the position because of their knowledge and expertise, such requests for additional funds or for authority to reorganize procedures were usually granted, as were requests for injunctive support.²¹⁵

This ability to raise new revenue and to reorganize operating procedures was the most significant and useful of the receiver's powers. Receivers were effectively given control of the company (under court supervision) and had full power to hire and fire employees, to contract with suppliers and customers, to sell or mortgage portions of the company, and to raise new revenues by the issuing of receiver's certificates.²¹⁶ For

²⁰⁸ For the purpose of this article, the term receiver will be used to denote receivers, masters or trustees unless otherwise noted.

²⁰⁹ See CHARLES ZELDEN, *JUSTICE LIES IN THE DISTRICT* 41-45 (1983); Staring, *supra* note 200, at 1162; Douglas & Marshall, *supra* note 206, at 25; see generally Payne, *supra* note 200.

²¹⁰ Staring, *supra* note 200, at 1162.

²¹¹ *Cowdrey v. Railroad, Co.*, 6 F. Cas., 660, 662 (1870).

²¹² *Id.*

²¹³ *St. Louis Frog and Switch Co. v. St. Louis, Brownsville and Mexico R.R.*, No. 36 (S.D. Tex. 1912) (providing an example of this process). The files in this case fill over 15 storage boxes. Most of these files are made up of reports and requests by the receiver to the Court requesting the right to raise money through receiver's bonds or to improve the physical condition of the road. The majority of requests were approved by the Court.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ See generally Martin, *supra* note 198; see also Payne, *supra* note 200, at 685-701;

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FROM RIGHTS TO RESOURCES

the duration of the receivership, they were the boss, and as such, had full authority to construct a reorganization plan to their own specifications (although, once again, under direct court supervision and approval of the plan).²¹⁷ The norm was for receivers to work closely with the interested parties, including the stockholders, secured creditors, unsecured creditors, employees and state government officials.²¹⁸ But, all these interests were explicitly subordinate to the needs of the wider community.²¹⁹ As Judge Waller T. Burns of the Southern District of Texas noted in a 1915, where the property in receivership “was in bad shape, creditors ha[d] no reasonable grounds to expect an early adjustment of their accounts,” until every effort had been “made by the Receiver, under the direction of the Court, to put the property in such shape as to permit its operation.”²²⁰ Only after the public's interest had been served and continued service was assured was the court to concern itself with creditors' rights.²²¹

It was to these enforcement procedures that the district Courts turned in response to the Supreme Court's demand for action in 1968. *Brown II*²²² had noted that civil rights cases “call for the exercise of . . . traditional attributes of equity power”;²²³ *Green*²²⁴ made clear the High Court's commitment to change. With little time or discretion in these matters, the district judges (who, we should recall, were not overly enthused with the job) turned to the familiar equity procedures of the past for guidance and found the receivership model applicable in constructing remedies to enforcement problems. “The comprehensive remedial decrees” for civil rights matters, notes Judge Frank M. Johnson, Jr. of the middle District of Alabama and later the Fifth Circuit Court of Appeals, “presents no more than the use of conventional judicial tools for dealing with complexity and intransigence in an unconventional setting”²²⁵ Legal scholars Theodore Eisneberg and Stephen Yeazell agree, noting how “what is said to be new in

Fuller, *supra* note 200, at 377-92.

²¹⁷ See *St. Louis Frog*, No. 36, (S.D. Tex., 1912); see also ZELDEN, *supra* note 209.

²¹⁸ See generally Martin, *supra* note 198; see also Payne, *supra* note 200, at 685-701; Fuller, *supra* note 200, at 377-92.

²¹⁹ Fuller, *supra* note 219, at 382-92.

²²⁰ Letter from Waller T. Burns, Judge of the Southern District of Texas, *Letters*, to Southwestern Mercantile Agency, vol. 5, no. 2, at 239 (Apr. 19, 1915) (to be archived in the University of Texas Law Library). See also *Farmers Grain Co. v. Toledo, P. & W. R. R.*, 66 F. Supp 845, 858 (1946), *rev'd*, 158 F.2d 109 (1946), *vacated*, 332 U.S. 748 (1947) (“the interests of the public and the duty of the carrier to continue to provide transportation are given precedence over the interests of secured and unsecured creditors . . . and stockholders [T]he public's right in the matter has always been preferred to the property rights of all other persons.”).

²²¹ *Farmers Grain*, 66 F. Supp. at 858.

²²² 349 U.S. 294.

²²³ *Id.* at 300.

²²⁴ 391 U.S. 430 (1968).

²²⁵ Johnson, *supra* note 197, at 274.

these cases [civil rights suits] is really only a response to the problems of intransigence and complexity that the law had dealt with in ‘extraordinary’ ways for centuries.”²²⁶ This “extraordinary” way, in turn, was the equity receivership and its enforcement corollaries.²²⁷

Viewed from this perspective, *United States v. Texas*²²⁸ exemplifies one of the receivership model’s basic mechanisms: the appointment of receivers or other experts to act as the court’s eyes, ears and hands (first the use of the TEA and later the Hispanic political reform groups) to assure compliance with the court’s orders. Though this process did not work as planned, it does show the method that would be used with greater effect in other cases. (It also shows the inherent dangers in such appointments. For the receivership process to work, the receiver had to act in good faith and with positive effect).

An example of a case in which the process worked as planned was the 1965 case of *Turner v. Goolsby*.²²⁹ In this Southern District of Georgia case, the Taliaferro County School Board had circumvented a court-ordered desegregation plan to integrate the district’s two segregated schools by closing the white-only school and busing the white students to schools in adjoining counties.²³⁰ The Court responded with an order to halt this practice.²³¹ The school board resisted.²³² Realizing that an injunction alone would not force compliance and thus resolve the dispute, the Court turned to alternate enforcement methods.²³³ As the three-judge panel noted, “in order to avoid irreparable injury to the white children which would result from enjoining the use of public funds for their education, and to preserve the rights of 87 Negro applicants for transfer, the [District] Court . . . concluded that in the exercise of its equity power it will be necessary to place the school system of Taliaferro County in receivership.”²³⁴ To this end, the three judge panel hearing this case appointed the state superintendent of schools as receiver with instructions to submit a remedial plan that would assure compliance with the court’s desegregation order.²³⁵ The state official quickly complied. Entering into negotiations with the various school districts involved in this case, the receiver convinced the surrounding school districts where the white students of Taliaferro County were attending to accept the county’s black students as well.²³⁶

²²⁶ Eisenberg & Yeazell, *supra* note 198, at 491.

²²⁷ *Id.*

²²⁸ *United States v. Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970).

²²⁹ 255 F. Supp. 724 (S.D. Ga. 1966).

²³⁰ *Id.* at 730.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 733.

He then made sure that the buses used to transport the children, and the facilities in these other districts, were desegregated.²³⁷ The initial problem solved, the receiver was then directed to investigate longer-term problems. These included academic outcomes (black students from Talioferro county were failing in the adjoining county schools) and the desegregation of the Talioferro county schools (the adjoining county schools had made clear their refusal to accept any Talioferro students in subsequent years).²³⁸ The receiver responded to the outcomes problem by first investigating the usefulness of remedial instruction, and then, by exploring the means available to fund such instruction. In as much as the state had no funds for remedial instruction (and as the state superintendent of schools he knew this), his response was to produce and submit a court plan to the Department of Health, Welfare and Education for federal funding.²³⁹

On the greater problem of desegregation, the receiver worked with the board of education to produce a desegregation plan that was acceptable to all parties.²⁴⁰ At this time, he reported his successes back to the court and was dismissed from his position.²⁴¹

State officials were not the only source of receivers. Another option was to use the Federal Department of Health, Education and Welfare. Under the Civil Rights Act of 1964,²⁴² the HEW was given the job of policing the desegregation process of southern schools.²⁴³ Title VI of the Act authorized the HEW to deny federal funds to any school maintaining a dual education system.²⁴⁴ At the urging of President Johnson, HEW officials promptly sought to fulfill this function, issuing in December 1964 an order to all southern school districts to submit desegregation plans or forfeit their federal funding.²⁴⁵ Four months later, the HEW issued guidelines for districts to follow in drafting these plans; in 1966 and 1968, ever more stringent guidelines were announced.²⁴⁶ The result was to make the HEW a force in almost every southern school desegregation case.²⁴⁷ It also meant that guidelines were available to the courts

²³⁷ *Id.*

²³⁸ *Id.* at 733-34.

²³⁹ *Id.*

²⁴⁰ *Id.* at 734-35.

²⁴¹ *Id.* at 735.

²⁴² Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000 a-h-6 (1994)).

²⁴³ *Id.*

²⁴⁴ 42 U.S.C. § 2000d (1994).

²⁴⁵ 45 C.F.R. § 80 (1973); *see also* Mark Chadsey, *Federal Courts and Southern School Desegregation: The Courts Lead A Social Change* 113-20 (1996) (unpublished Ph. D. Dissertation, S.U.N.Y. Buffalo) (on file with UMI Dissertation Services).

²⁴⁶ Chadsey, *supra* note 245, at 113 (citing 45 C.F.R. § 80; 45 C.F.R. § 181 (1966)). The 1968 Guidelines, titled "Policies on Elementary and Secondary School Compliance With Title VI of the Civil Rights Act of 1964," are found in 33 Fed. Reg. 4955 (1968).

²⁴⁷ *See generally* James R. Dunn, *Title VI, The Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42 (1967); Comment, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321 (1967). Chadsey argues that the role of the HEW in

in defining acceptable integration plans.²⁴⁸

It was an availability that many courts chose to make use of. In *Whittenberg v. Greenville County School District*,²⁴⁹ a 1969 case involving some twenty-two South Carolina school districts, a special four-judge panel faced “the task of fashioning decrees that will assure compliance by the school districts with the applicable constitutional standards.”²⁵⁰ The problem, the Court noted, was that the districts varied so widely as to size, make-up and racial composition, that they did not “lend themselves to a uniform type of decree.”²⁵¹ The Court’s answer was to turn to the HEW for help in finding site appropriate remedies.

The difficulties involved in developing a proper decree concern . . . practical operational question and matters of educational administration. H. E. W., with its staff of trained educational experts ‘with their day-to-day experiences with thousands of school systems,’ is far better qualified to deal with such . . . problems than the Courts presided over by Judges, who, as one Court has phrased it, ‘do not have sufficient competence -- they are not educators or school administrators -- to know the right questions, much less the right answers’²⁵²

At the least, the Court went on to note, “it would seem H. E. W. should be solicited by the Courts to provide expert advice and guidance in determining applicable standards and in passing on the adequacy of the desegregation plans submitted by the defendant school districts.”²⁵³ From such cooperation, “a greater approximation of uniformity and equality of treatment in plans of desegregation among similar school districts in a State would be possible.”²⁵⁴ To this end, the judges ordered the defendant school districts to “promptly submit” to the HEW a report listing their “existing methods of operation,” as well as their thoughts on ways to desegregating their schools.²⁵⁵ They were then to “seek, within 30 days, to develop, in conjunction with the experts of [HEW], an acceptable plan of operation, conformable to the constitutional rights of the plaintiffs . . . and consonant in timing and method with the practical and administrative problems faced by the particular district.”²⁵⁶ If this plan could be developed to the

promoting school desegregation has been over-emphasized at the expense of the effect that district court rulings had in shaping the desegregation process. Chadsey, *supra* note 245, at 104-13.

²⁴⁸ Chadsey, *supra* note 245, at 104-13.

²⁴⁹ 98 F. Supp. 784 (D. S.C. 1969).

²⁵⁰ *Id.* at 788.

²⁵¹ *Id.* at 790-91.

²⁵² *Id.* at 790 (quoting *United States v. Jefferson*, 372 F. 2d 836, 855 (5th Cir. 1966)).

²⁵³ *Whittenberg*, 298 F. Supp. at 790.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

1999]

FROM RIGHTS TO RESOURCES

satisfaction of the HEW within thirty days, “such plan shall be adopted as the decree of this Court.”²⁵⁷ If no plan acceptable to the HEW was adopted, the HEW was “requested to submit promptly its [own] recommendation of an acceptable plan for the school district in question.”²⁵⁸ And, “absent some special showing by the parties” as to the plan’s “constitutional infirmity,” the Court would then “proceed without further hearing to enter its decree” based on this plan as amended by the suggestions of the defendants and plaintiffs.²⁵⁹

In *United States v. Watson Chapel School District No. 24*,²⁶⁰ a 1970 case arising out of the Eastern District of Arkansas, Judge Oren Harris turned to an HEW integration plan in response to the School District’s repeated refusal to come up with a workable alternative of its own.²⁶¹ In fact, rather than come up with a plan that met the Constitutional requirement to produce a unitary system, the Board had simply objected, and objected, and objected once again, to both the integration order and the HEW plan.²⁶² Their reasoning: a stated belief that “there is no constitutional requirement for race mixing.”²⁶³ Hence, though he waited “patiently and painstakingly” for the school board to change its attitude, ultimately, the judge was forced to act: “The school district has failed and refused to present a plan reasonably expected to comply with the law.”²⁶⁴

This left “the Court [with] no alternative at this late date but to require the school district to operate under a lawful system.”²⁶⁵ To this end, the Court, after considering “the two plans recommended by the Department of Health, Education and Welfare, as well as other alternatives,” concluded that the HEW plans “offer[ed] a more reasonable and adequate solution to the school’s needs and the requirements for a unitary system as required by law.”²⁶⁶ On appeal, the Eight Circuit endorsed the use of the HEW plans.²⁶⁷

Other cases where the courts chose to make use of the HEW’s services included: the 1969 case of *Carr v. Montgomery County Board of Education*,²⁶⁸ where a Middle District of Alabama judge approved a desegregation plan for neighborhood zoning of

²⁵⁷ *Id.* at 790-91.

²⁵⁸ *Id.* at 791.

²⁵⁹ *Id.*

²⁶⁰ The District Court’s judgement in this case was not published. All information and quotes come from *United States v. Watson Chapel Sch. Dist.*, 446 F. 2d. 933 (8th Cir. 1971).

²⁶¹ *Id.* at 935.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 935.

²⁶⁷ *Id.* at 937.

²⁶⁸ No. 29,521 (5th Cir. June 29, 1970), noted in 2 RACE REL. L. SURV. 92, 92 (1970) (appeal to the Fifth Circuit).

schools matched with the pairing of city and rural schools proposed by the Board, but constructed in cooperation with the HEW.²⁶⁹ Later that year, the same court, in the case of *Lee v. Macon County Board of Education*,²⁷⁰ ordered the Justice Department, as intervener-plaintiff, to have the HEW study the problem and make recommendations to help the school board arrive at a workable plan.²⁷¹ Should the subsequent plan be deemed unable to “realistically and effectively disestablish the dual system based on race,” Judge Frank Johnson concluded, the HEW was to submit its own plan.²⁷² Meanwhile, in 1971, Judge Bulter of the Eastern District of North Carolina named the HEW as “its consultant” with the job of developing a desegregation plan “in cooperation with the school board’s administrative staff.”²⁷³ When the Board objected to the plan submitted by the HEW, the court directed the Board to implement the HEW plan.²⁷⁴

The availability of the HEW to serve the receiver function proved fortuitous for the district courts. In using HEW guidelines, judges were finally able to share “the nettlesome school problem, to be freer of the weary load, so complex and controversial, that *Brown II* had assigned them.”²⁷⁵ More importantly, their use pointed to the primary reason for turning to the receivership model in the first place: the ongoing and complex nature of such cases. It was with this in mind that the Fifth Circuit in *Jefferson*²⁷⁶ had recommended that, as judges were “not educators or school administrators,” and thus lacked “sufficient competence . . . to know the right question, much less the right answers” in these matters, “courts in this circuit should give great weight to future HEW Guidelines.”²⁷⁷ The result was that HEW guidelines served as the foundation of desegregation plans across the south.²⁷⁸

Of course, not all judges chose to make use of State Officials or the HEW. Other options were available. In *Lee v. Macon County Board of Education*,²⁷⁹ Judge Frank Johnson of the Middle District of Alabama, in addition to seeking the help of the HEW, turned regularly to the Justice Department’s Civil Rights Division to fill aspects of the receiver role. A large and complex case, *Lee* involved the desegregation of almost all of the state’s school systems.²⁸⁰ Adopted in response to the continual opposition to his desegregation orders by Alabama Governor George Wallace, and the subsequent lack of

²⁶⁹ 2 RACE REL. L. SURV. at 92.

²⁷⁰ No. 604-E (M.D. Ala. Oct. 23, 1969), noted in 1 RACE REL. L. SURV. 204-05 (1970).

²⁷¹ 1 RACE REL. L. SURV. at 204-05.

²⁷² *Id.*

²⁷³ *Eaton v. New Hanover County Bd. of Educ.*, 330 F. Supp. 78, 78 (E.D. N.C. 1971).

²⁷⁴ *Id.* at 79-80.

²⁷⁵ WILKINSON, *supra* note 2, at 107.

²⁷⁶ *United States v. Jefferson County Bd. of Educ.*, 372 F. 2d 836, 855 (5th Cir. 1966).

²⁷⁷ *Id.* at 847, 855, 858.

²⁷⁸ See Comment, *supra* note 247, at 349-50.

²⁷⁹ 292 F. Supp. 363 (M.D. Ala. 1968).

²⁸⁰ *Id.* at 363; see also JACK BASS, TAMING THE STORM 229-30 (1993).

1999]

FROM RIGHTS TO RESOURCES

integration in the state, the judgment required a “uniform state-wide plan for school desegregation” for every school district not already under the a court order.²⁸¹ Given the overwhelming nature of this task (Judge Johnson would subsequently spend much of his time for the next year and a half in implementing this order)²⁸² the Judge turned to the Civil Rights Division’s head, John Doar, for help in constructing, implementing and enforcing the integration plans. “I think John Doar, speaking for the civil rights division on the Department of Justice, had a special role in Frank Johnson’s courtroom,” writes Owen Fiss, aid to Doar at that time.²⁸³ “Judge Johnson . . . invited the Department of Justice in because he wanted a lawyer in that case he could have total confidence in -- someone that would be a friend of the court, who could advise the court.”²⁸⁴ Johnson did this, Fiss holds, in large part out of a high respect for Doar. “There was something like total respect for each other, total confidence.”²⁸⁵ Yet, the Judge also did this because, if such a large integration plan were to work, he needed “information on what [was] going to effectively desegregate the schools. . . a kind of technocratic advice on what was needed to get the job done” as well as a “kind of factual justification for what [he] was doing.”²⁸⁶ This was exactly the service provided by the federal lawyers. “When we finished trying one of these cases, Judge Johnson had the sort of factual predicate -- or basis -- to exercise coercive power.”²⁸⁷ As a result, “most of the witnesses, most of the information, most of the discovery was always done by the Department of Justice.”²⁸⁸

In Jacksonville, Florida, Judge Bryan Simpson turned to a university research center for help. This case, that of *Mims v. Duval County School Board*,²⁸⁹ posed the usual enforcement problems for a desegregation suit. In 1960 Judge Simpson had ordered the school board to produce a desegregation plan; the board had returned in 1963 with a combined stair-step/freedom-of-choice program which the judge quickly approved.²⁹⁰ Progress, however, proved very slow. In March of 1965, out of a total of about 30,000 black students in the Jacksonville-Duval County school district, only some sixty black children were attending integrated schools.²⁹¹ A modification of the desegregation plan, adopted at that time to speed up the process, proved ineffective.²⁹²

²⁸¹ *Lee*, 292 F. Supp. at 365-67.

²⁸² BASS, *supra* note 280, at 229-30.

²⁸³ *Id.* at 232 (quoting Owen Fiss).

²⁸⁴ *Id.* at 233.

²⁸⁵ *Id.* at 232.

²⁸⁶ *Id.* at 233-34.

²⁸⁷ *Id.* at 234.

²⁸⁸ *Id.*

²⁸⁹ 329 F. Supp. 123 (M.D. Fla. 1971), *aff’d*, 447 F. 2d. 1330 (5th Cir. 1971).

²⁹⁰ *Mims*, 329 F. Supp. at 126. For background to this case, see FRANK T. READ & LUCY S. MCGOUGH, LET THEM BE JUDGED 510-21 (1978).

²⁹¹ *Mims*, 329 F. Supp. at 126.

²⁹² *Id.* at 126-27.

By 1967, Simpson had had enough. Convinced that the board was purposely holding up the integration process by a mix of racial gerrymandering and transfer politics (refusing black transfers to white schools while allowing white transfers from integrated schools to white-only schools), and further that the board was either unwilling or incapable of producing an effective integration plan, the Judge requested the help of the South Florida Desegregation Center of the University of Miami.²⁹³ In January 1969, the Center submitted its report which became the foundation of a new integration plan.²⁹⁴ At this time, Judge Simpson moved up to the Fifth Circuit. He was replaced in 1970 by William McRae, Jr., who, in the wake of the Supreme Court's *Green*²⁹⁵ and *Carter*²⁹⁶ decisions, as well as that in *Swann v. Charlotte-Mecklenburg Board of Education*,²⁹⁷ ordered the school superintendent to seek further assistance from the School Desegregation Center.²⁹⁸ The matter finally came to a head in May of 1971, when a third judge, Gerald B. Tjoflat, brought all the pieces together and imposed his own plan, one based, in part, on the proposals of the Desegregation Center.²⁹⁹

Another option available to judges in using the receivership model as a guide to action was to name the school board as trustee for itself. In cases of this sort, the Court would chose the implantation methods, set this policy with its judgement, and then leave it to the board to implement this policy under court supervision.³⁰⁰ The most effective way to do this, and the judges preference in these matters, was for the board to come up with a workable plan on its own which the Court would then approve.³⁰¹ For, as judge after judge would note in their opinions, the burden in coming up with a desegregation plan lay first and foremost with the school board itself: "before considering any other desegregation plan, it is incumbent upon the court to examine proposal of the school board, and if that plan meets constitutional requirements, the court should look no further."³⁰² Where the school board fulfilled this burden, the

²⁹³ *Id.* at 127-28.

²⁹⁴ *Id.* at 129.

²⁹⁵ *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

²⁹⁶ *Carter v. West Feliciana Parish Sch. Bd.* 396 U.S. 290 (1970).

²⁹⁷ 402 U.S. 1 (1970).

²⁹⁸ *Mims*, 329 F. Supp. at 129-30.

²⁹⁹ *Mims v. Duval County Sch. Bd.*, 338 F. Supp. 1208, 1209-10 (M.D. Fla. 1972). The South Florida Desegregation Center was also used (in conjunction with the HEW) in *Pate v. Dade County Sch. Bd.*, 315 F. Supp. 1161 (S.D. Fla. 1970), *aff'd and modified*, 434 F.2d 1151 (5th Cir. 1970). Another similar option was the use of private corporations specializing in desegregation matters. *See Vaughns v. Bd. of Educ.*, 355 F. Supp. 1034 (D. Md. 1972).

³⁰⁰ *E.g. Yarbrough v. Hulbert-West Memphis Sch. Dist.*, 329 F. Supp. 1059 (E.D. Ark. 1971); *Gordon v. Jefferson Davis Parish Sch. Bd.*, 315 F. Supp. 901 (W.D. La. 1970), *vacated*, 446 F.2d 266 (1971).

³⁰¹ *Gordon*, 315 F. Supp. at 901 n.1 (noting "federal courts have long recognized that they should not endeavor to devise plans for desegregation for any school district when, as here, the School Board presents a feasible plan that works.").

³⁰² *Yarbrough*, 329 F. Supp. at 1064.

courts were very happy to provide formal approval and support. Of course, not many school boards chose to abide by their constitutional burden in these matters and so the courts were forced to take more precipitous action.

It was here that many judges turned to alternative sources for integration plans. This process could be done in any number of different ways. The court could turn to various types of receivers as described above and below.³⁰³ It could also turn to the plaintiffs or various interveners for proposals, choosing among the many options for the best possible mix of methods.³⁰⁴ A third option involved mandatory injunctions, often mixed with suggestions, ordering the board to come up with a workable plan.³⁰⁵ And, of course, the judge could simply come up with a plan on his own.³⁰⁶

Whatever the source, at some point, the court would choose a plan and issue a decree requiring the school board to implement said plan. Once again, where the school board chooses to abide by its constitutional duty, the court could allow the issue to rest, trusting to the plaintiffs to bring any occasional violations to the court's attention. Where the board had already proven intransigent, however, judges usually felt it necessary to initiate more stringent oversight. While this could mean nothing more than requiring annual or bi-annual reports from the school board,³⁰⁷ a more common method of enforcement (and one drawing noticeably from the courts' experience in business receiverships) was the creation of bi-racial committees charged with the supervision of the plan to fill the special master function of the receivership model.

In Miami Florida, for example, after choosing a desegregation plan from a long list of proposed plans, Judge Atkins ordered the creation of a "Bi-Racial Committee composed of 12 members, six White and six Black, . . . [to] review the operation of the majority to minority pupil transfer rule, the transportation system, selection of school sites, and such other special assignments as the Court may direct."³⁰⁸ To this end, the

³⁰³ See *supra* note 222 through *infra* note 328 and accompanying text.

³⁰⁴ An example of a how many options were available to a judge is *Pate*, 315 F. Supp. at 1161-66. In this one case there were three major and three minor plans proposed to the court. The major plans included one by School Board, by HEW, and by the Dade County Classroom Teachers' Association (CTA). The minor plans included proposals by the American Civil Liberties Union, the Governor of Florida along with the local Congressmen, and a plan proposed by a parents group (The Ring-Horwich Plan). The Court's final decree was a mix of the three major plans with small adjustments from the minor plans.

³⁰⁵ *E.g.*, *Dandridge v. Jefferson Parish Sch. Bd.*, 332 F. Supp. 590 (E.D. La. 1971), *aff'd*, 456 F.2d 552 (5th Cir. 1972).

³⁰⁶ *E.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 311 F. Supp. 265 (W.D. N.C. 1970), *vacated*, 431 F.2d 138 (4th Cir. 1970), *aff'd*, 402 U.S. 1 (1971).

³⁰⁷ See *Tasby v. Estes*, 342 F. Supp. 945, 953 (N.D. Tex. 1971), *aff'd*, 572 F.2d 1010 (5th Cir. 1978), *vacated*, 651 F.2d 287 (5th Cir. 1981).

³⁰⁸ *Pate v. County Sch. Bd.*, 315 F. Supp. 1161, 1174 (S.D. Fla. 1970).

Committee was “authorized to hold hearings and make recommendations to the Board in connection with these activities.”³⁰⁹ In Atlanta, a three-judge panel matched the creation of a bi-racial committee with an order to the litigants to “first present to [the committee] any disagreement regarding the operation of this order prior to filing a motion with the Court.”³¹⁰ Meanwhile, in Dallas, Judge William Taylor, Jr. created a Tri-Ethnic Committee to deal with the problems posed by the City’s large Hispanic and black populations.³¹¹ Charged with the oversight of transportation systems, teacher assignments, student transfers and the selection of school sites, the Committee was to report monthly and be given “adequate office space . . . in the federal building” while the school board “provide[d] sufficient funds for the employment of two secretaries . . . and appropriate office equipment and supplies.”³¹² A similar tri-ethnic committee was created in Corpus Christi as well.³¹³

A final option available to district judges, and the one closest to the origins of the receivership model, was to appoint independent experts as receivers. In the initial steps of the landmark case of *Swann v. Charlotte-Mecklenburg Board of Education*,³¹⁴ for example, rather than turn to a state or federal official, Judge James B. McMillan turned to an outside expert, Dr. John A. Finger of Rhode Island College, as receiver.³¹⁵ He did this in response to the repeated refusal of the School Board to produce a plan that met the immediate integration standards set by the Supreme Court in *Green*.³¹⁶ “I asked the School Board to make those changes on their own,” the judge later noted in a 1981 Senate hearing on school busing, “they declined.”³¹⁷ In fact, Judge McMillan made repeated requests to the School Board to work with him in producing a viable plan. And each time the board declined the invitation.³¹⁸ Dr. Finger, who had originally come before the Court as a witness for the plaintiffs,³¹⁹ responded to his commission

³⁰⁹ *Id.*

³¹⁰ *Calhoun v. Cook*, 362 F. Supp. 1249, 1252 (N.D. Ga. 1973).

³¹¹ *Tasby*, 342 F. Supp. at 953.

³¹² *Id.*

³¹³ *Cisneros v. Corpus Christi Indep. Sch. Dist.*, 330 F. Supp 1377 (S.D. Tex. 1971), *aff’d*, *modified and remanded*, 467 F.2d 1377 (5th Cir. 1971). On the tri-ethnic committee, see Mary Alice Davis, *Cox Modifies Computer Plan*, CORPUS CHRISTI CALLER, July 30, 1970, at A1.

³¹⁴ 311 F. Supp. 265 (W.D. N.C. 1970), *vacated*, 431 F. 2d 138 (4th Cir. 1970), *aff’d in part*, 402 U.S. 1 (1971).

³¹⁵ *Swann*, 311 F. Supp. at 266-67, 269. In his judgement, Judge McMillan called Dr. Finger an “expert.” *Id.* at 269. But Finger’s powers and actions were that of a receiver.

³¹⁶ *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

³¹⁷ *Court-Ordered School Busing: Hearings before the Subcommittee on Separation of Powers of the Committee on the Judiciary*, United States Senate, 97th Congress, 1st Sess., 529, *quoted in* BERNARD SCHWARTZ, *SWANN’S WAY* (1986).

³¹⁸ *Id.*

³¹⁹ Judge McMillan’s use of a plaintiff’s witness as receiver proved controversial. On appeal the Fifth Circuit would caution “that when a court needs and expert, it should avoid appointing a person who has appeared as a witness for one of the parties.” *Swann*, 431 F.2d

1999]

FROM RIGHTS TO RESOURCES

with a comprehensive integration plan shaped to deal with the district's enforcement problems.³²⁰ In particular, he turned to the then unused option of mandatory busing.³²¹

The same pattern followed one year later, when a Northern District of Mississippi judge turned to an independent expert in a suit to desegregate the Indianola Municipal School District.³²² The appointment of an independent receiver had not been the judge's first choice. In January 1970, the judge, under pressure from the Fifth Circuit,³²³ had ordered the school board to adopt and implement an HEW integration plan.³²⁴ The school board countered with a motion that under this plan "this defendant school district will remain an all Negro district and the effectiveness of the school district will be destroyed. . . ."³²⁵ They requested, therefore, the appointment of a special master to study the matter and submit a new plan for the upcoming school year.³²⁶ The judge responded by appointing Dr. James McCullough, of the Mississippi State University faculty, as Special Master with the task of making "a full study" and all "proper recommendations" for the desegregation of all grades by the 1970-1971 school year.³²⁷

Still another case where outside receivers were appointed involved the 1971 integration of the Augusta Georgia schools.³²⁸ Faced with obstructionism from the school board, and not receiving the help he expected from the HEW or the Justice Department (under President Nixon, both the HEW and the Justice Department backed away from aggressively promoting integration),³²⁹ Judge Alexander Lawrence of the Southern District of Georgia turned to two independent experts to serve as receivers.³³⁰ Their job was to produce an integration plan that met all Supreme Court directives and

at 148. The Supreme Court would second this view. In neither case, however, would this matter affect the final outcome of the case, which was ultimately upheld by the Supreme Court. *Swann*, 402 U.S. at 31. Judge Mcmillan's explanation for why he appointed Finger was the difficulty of finding an expert from the local community who would accept the appointment in the face of community objections. SCHWARTZ, *supra* note 317, at 17-18.

³²⁰ *Swann*, 311 F. Supp. 266-67.

³²¹ *Id.* at 268.

³²² *Indianola Mun. Separate Sch. Dist., No. GC 6637-K (N. D. Miss. Mar. 30, 1970), noted in 2 RACE REL. L. SURV. 56, 56-7 (1970).*

³²³ *See United States v. Indianola Mun. Separate Sch. Dist.*, 410 F.2d 626 (5th Cir. 1969).

³²⁴ *2 RACE REL. L. SURV. at 57 (1970).*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Acree v. Drummond*, 336 F. Supp. 1275 (S.D. Ga. 1972), *modified*, 458 F.2d 486 (5th Cir. 1972).

³²⁹ *Acree*, 336 F. Supp. at 1278; *see also* Chadsey, *supra* note 245, at 212-220 (discussing HEW's shift in policy after 1969).

³³⁰ *Acree*, 336 F. Supp. at 1278.

the particular needs of the Augusta schools.³³¹ Appointed in August, 1971, the two receivers quickly came up with a plan which they presented to the court in October of 1971.³³² After an extension to allow the interested parties one last chance to come up with their own plan, and the failure of those parties to act on this chance, the Court approved the receivers' plan in January, 1972.³³³

Rare at first, the use of receivers or other court appointed adjuncts to investigate, create and/or enforce integration orders had become common in the South by 1971 -- especially when one adds in the number of cases where the judge issued a detailed decree and then forced the defendant school board to act as its own trustee in enforcing the court order. This number would only increase as integration continued apace in the South and moved into the large urban school districts of the North.³³⁴ The result was to make the receivership model a foundation for the federal courts' integration efforts.

4. The Troubling Problem Of Color: The Shift To Color-Conscious Remedies

Whatever its particular form, the wide application of the receivership model for enforcement in integration cases proved to be a momentous decision. The pairing of mandatory injunctions and sweeping decrees with the appointment of receivers, trustees, special masters and/or bi-racial committees, gave the district courts the tools necessary to overcome the opposition, obstructionism and complexity which to date had undercut the effectiveness of desegregation decisions. By bringing the expertise and coercive powers of a court, and its agent the receiver, to bare on these matters, the federal courts finally had the ability to make integration a real (if not always fully realized) proposition. By 1972 the South, at forty-six percent, was the most integrated region in the nation.³³⁵ It would continue to be so throughout the decade.³³⁶

³³¹ *Id.*

³³² *Id.*

³³³ *Id.* at 1280, 1286-87.

³³⁴ Though the application of the receivership model began in the South, it would be northern districts which, faced with the greater complexity posed by such enormous and diverse urban districts (and with the South's experiences as a guide), would bring the school receivership to its full potential. A discussion of this process is beyond the scope of this work. For a discussion of northern receiverships, see Kirp & Babcock, *supra* note 196, at 325-97 (discussing six northern integration suits, all involving the use of special masters). An example of the continuation of Southern receiverships is *United States v. Texas Education Agency*, where the Fifth Circuit proposed to a district court that it should "consider appointing a master to prepare a comprehensive school desegregation plan." 532 F. 2d 380, 399 (5th Cir. 1976), *vacated*, 429 U.S. 990 (1976). The District Judge heeded the call, appointing a master who produced a plan.

³³⁵ *School Desegregation Statistics*, RACE REL. REP., *quoted in* ALLEN J. MATUSOW, *THE UNRAVELING OF AMERICA* 193 (1984).

³³⁶ *Id.*

There was, however, one unintended consequence to applying the receivership model to civil rights matters, one that related directly to the methods chosen to desegregate dual school districts. School cases posed two pressing problems that had to be solved if integration were to be a reality: (1) the problem of how much race mixing was necessary to produce a unitary school district; (2) who to move, and in what manner, to achieve this proper mix. As noted above, integration cases were normally big, complex and difficult for the district courts to handle. Even where the judge was ready to take the heat of a decision for immediate integration, implementing a plan that met Supreme Court directives, plaintiff's demands, defendant's fears and the never to be forgotten need to provide a quality education for all the students was simply a difficult proposition.

The receivership model offered an answer to these problems. One of the ways that traditional receiverships had dealt with the complex issues posed by a bankruptcy reorganization was by simplifying its relations with those who had a claim on the company's assets (creditors, stockholders, employees).³³⁷ The problem was that each of these players had their own specific, and competing, claims; if the receiver were to deal with each claimant's needs on an individual basis nothing would ever get done.³³⁸ To rectify this matter, receivers grouped claimants by the nature of their claims on the company.³³⁹ That is to say, stockholders were treated as a single group; so too employees, etc. With creditors, who usually made up the most numerous of claimants, the receiver would take the classification scheme ever further, categorizing the creditors by the nature of the debts owed to them. In this way, those holding a mortgage to the company would be separated out from more common bond holders, who would in turn be categorized separately from unsecured creditors (suppliers and service providers).³⁴⁰

The effect of such categorization was to impose a group, as opposed to individual, perspective in these matters. This shift proved significant, since which category you were placed in affected your respective rights to the company's assets. In 1913, the Supreme Court in *Northern Pacific Railway Co. v. Boyd*³⁴¹ had held that the respective claims to a company's assets must be ranked as to their proper order of priority.³⁴² Participation in the reorganized company, in turn, would be distributed to claimants in *descending* order based on those priorities.³⁴³ When the assets were fully distributed,

³³⁷ See Payne, *supra* note 200, at 689-93.

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ 228 U.S. 482 (1913).

³⁴² *Id.* at 504-05.

³⁴³ *Id.* at 508. This doctrine was reinforced by the Supreme Court in the 1939 case of *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 115-22 (1939); see also Walter J. Blum & Stanley A. Kaplan, *The Absolute Priority Doctrine in Corporate Reorganizations*, 41 U.CHL. L. REV. 651, 654-55 (1974).

the process ended, even if some lower ranked claimants received nothing.³⁴⁴ This meant that it did not matter if you had one share or one thousand in terms of how the receiver viewed your rights in these matters, you were treated the same. More significantly, it meant that a bond holder owed \$100 had a greater claim on the receiver for action than an unsecured creditor owed \$10,000. The individual's particular needs were subordinated to the group's, and the remedies provided were aimed at meeting the group's general needs and rights -- even where, on an individual basis, this produced an injustice.

Applied to civil rights, this group perspective lent itself to the shift from color-blind (i.e. individual) remedies to race-based (i.e. group) remedies. Circuit Judge John Minor Wisdom had pointed the way toward race-conscience enforcement of the equal protection clause in *Jefferson I*.³⁴⁵

The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate government purpose.³⁴⁶

In order to make integration work, in other words, the courts would have to recognize and apply race in constructing remedies. Yet to do so on an individual basis was an enormous task: deciding that for student A, race was an issue, while for student B, it was not, was difficult; doing so for each of tens of thousands of students, was impossible. Yet race-based remedies were clearly called for if the Supreme Court's directives were to be met. It was in attempting to deal with this dilemma that district Judges turned to the method of group-based remedies inherent in the receivership model -- in particular, the application of specific ratios and quotas matched with mandatory busing (or other extreme measures) in faculty hiring, facilities construction and student transfers as the means of shifting these bodies around.

Take, for example, the issue of faculty integration. Prior to *Brown*,³⁴⁷ teachers were as segregated by race as their students.³⁴⁸ It therefore followed that when the courts

³⁴⁴ Blum & Kaplan, *supra* note 343, at 654-55.

³⁴⁵ 372 F. 2d 836 (5th Cir. 1966).

³⁴⁶ *Id.* at 876.

³⁴⁷ 347 U.S. 483 (1954).

³⁴⁸ *E.g.*, *Macklin v. County Bd. of Educ.*, Civ. No. 4392 (M.D. Tenn. Apr. 11, 1966), *noted in* 11 RACE REL. L. REP. 805, 805-06 (1966); *Thompson v. County Sch. Bd.*, Civ. No. 4274 (E.D. Va. Apr. 22, 1966), *noted in* 11 RACE REL. L. REP. 1311, 1311-14 (1966); *Turner v. County Sch. Bd.*, Civ. No. 4343 (E.D. Va. May 4, 1966), *noted in* 11 RACE REL. L. REP. 1314, 1314-15 (1966); *Banks v. St. James Parish Sch. Bd.*, Civ. No. 16173-F (E.D. La. July 27, 1967), *noted in* 12 RACE

ordered student integration, they would order the same for teachers and staff. This, in fact, was what many district courts did. Yet problems quickly arose. Few school districts wanted any form of integration. For many whites, the thought of black teachers teaching white students was horrific.³⁴⁹ Opposition to teacher integration therefore proved as strong as that for students. Yet, in many ways, the issue of faculty integration was the easier problem to solve; the numbers were smaller, and the problems associated with moving students between schools did not exist here. Still, despite this greater facility for integration, few school districts sought to integrate teachers. Many sought to delay as long as possible.³⁵⁰ This obstructionism forced district judges to respond in new ways. And for many judges, this new way was to set explicit faculty integration goals based on the districts ratio of white to black teachers.

The landmark case in this matter was *Carr v. Montgomery County Board of Education*.³⁵¹ Argued before Judge Frank M. Johnson, Jr., the case began in 1964 with an order to the school board to adopt a desegregation plan for both students and faculty.³⁵² In regards to faculty integration, the order read that:

Race or color will henceforth not be a factor in hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff, with the exception that assignments shall be made in order to eliminate the effects of past discrimination. Teachers, principals, and staff members will be assigned to schools so that the faculty and staff is not composed of members of one race.³⁵³

It went on to order the “Superintendent of Schools and his staff” to “take affirmative steps to solicit and encourage teachers presently employed to accept transfers to schools in which the majority of the faculty members are of a race different from that of the teacher transferred” beginning in September 1967.³⁵⁴ Progress proved very slow, however. As of February 1968, only thirty-two teachers were “teaching pupils in schools that were predominantly of the opposite race.” This, out of a pool of some 550

REL. L. REP. 1279, 1279-80 (1967); *August v. Bd. of Pub. Instruction* (N.D. Fla. Apr. 19, 1967), noted in 12 RACE REL. L. REP. 796, 796-97 (1967).

³⁴⁹ See *Carr v. Montgomery County Bd. of Educ.*, 289 F. Supp. 647 (M.D. Ala. 1968), *aff'd*, 400 F.2d 1 (5th Cir. 1968), *rev'd*, 395 U.S. 225 (1969) (providing an example of parent opposition to integrated faculties).

³⁵⁰ *E.g., id.*; *Conley v. Lake Charles Sch. Bd.*, 314 F. Supp 1282 (W.D. La. 1970), *rev'd in part and aff'd in part*, 434 F.2d 35 (5th Cir. 1970); *Coppedge v. Franklin County Bd. of Educ.*, 273 F. Supp. 289 (E.D. N.C. 1967), *aff'd*, 394 F.2d 410 (4th Cir. 1968); *Calhoun v. Cook*, 362 F. Supp. 1249 (N.D. Ga. 1973); see also *Clark v. Bd. of Educ.*, 426 F. 2d 1035 (8th Cir. 1970); *United States v. Wilcox County Bd. of Educ.*, 494 F. 2d. 575 (5th Cir. 1974).

³⁵¹ 289 F. Supp 647 (M.D. Ala. 1968), *aff'd*, 400 F.2d 1 (5th Cir. 1968), *reh'g denied*, 402 F.2d 782 (5th Cir. 1968), *rev'd*, 395 U.S. 225 (1969).

³⁵² *Carr v. Montgomery County Bd. of Educ.*, 253 F. Supp. 306, 307 (M.D. Ala. 1966).

³⁵³ *Id.* at 310.

³⁵⁴ *Id.*

black and 815 white teachers.³⁵⁵ Most of this movement, in turn, took place in the limited environment of the high schools and within the City of Montgomery.³⁵⁶ As for new hires, since the 1967 order the district had hired thirty-two new teachers, twenty-six white and six black.³⁵⁷ Of this number, twenty of the white teachers were appointed to white majority schools while all of the black teachers were assigned to those where blacks were the majority.³⁵⁸ The same pattern followed for substitute and student teachers.³⁵⁹

Angered that fourteen years after *Brown*³⁶⁰ created an affirmative duty for school boards to disestablish their dual school systems teachers were still segregated as to race, Judge Johnson felt that the time for action had come. Further delay was not an option. To this end, the Judge issued a detailed desegregation order whose foundation was based on the simple proposition that “the school board will be guided by the ratio of Negro to white faculty members in the school system as a whole.”³⁶¹ This was to be achieved by “hiring and assigning faculty members so that in each school the ratio of white to Negro faculty members [was] substantially the same as . . . throughout the system.”³⁶² At that time, the ratio of white to black was 3 to 2. Therefore, a 3 to 2 ratio was to be the “ultimate objective” or proof of success in integrating faculty and staff.³⁶³ And, to help the school board achieve this ratio, the Judge laid out a specific schedule to follow. In the first year, “at every school with fewer than twelve teachers,” the board was to have “at least two full-time teachers whose race [was] different from the race of the majority of faculty”; for those schools with more than 12 teachers, “at least one of every six faculty and staff members” was to differ from the majority.³⁶⁴ The second year would see the full implementation of the 3 to 2 ratio.³⁶⁵ As to the troubling issue of how to move teachers to achieve these standards, the Judge left it up to the school board to find its preferred method. However, the Judge noted that, should the school board not “achieve faculty desegregation by inducing voluntary transfers or by filling vacancies,” then it was to do so “by the assignment and transfer of teachers from one school to another,” involuntarily if necessary.³⁶⁶

This case was subsequently appealed to the Fifth Circuit, which, in a split decision,

³⁵⁵ *Carr*, 289 F. Supp. at 650.

³⁵⁶ *Id.* at 651.

³⁵⁷ *Id.* at 650.

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

³⁶¹ *Carr*, 289 F. Supp. at 654.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.*

1999]

FROM RIGHTS TO RESOURCES

modified Johnson's decree.³⁶⁷ In particular, the majority on the panel questioned the application of explicit racial targets as a guide to integration. Not that they objected to mandatory teacher transfers or even the idea of target dates, rather they were uncomfortable with the idea of fixed standards and the use of mathematical ratios based on race to determine full compliance.³⁶⁸ Consequently, they held that "because of the difficulties inherent in achieving a precise five-to-one ratio, this part of the district court's order should be interpreted to mean *substantially* or *approximately* five to one."³⁶⁹

This was a position that the Circuit's Chief Judge, John R. Brown, and others on the circuit court felt dangerous.³⁷⁰ While the specificity of Johnson's opinion was something new, and perhaps scary, it was a necessary step if faculty integration was to succeed. "Specifics are needed," the Chief Judge wrote.³⁷¹ "Specifics are needed by the school administrators. Specifics are needed by the Negroes who have waited these 14 years for 'a bona fide unitary system where schools are not white schools or Negro schools -- just schools.'"³⁷² And, though not explicitly stated, it was clear specific deadlines, standards and mathematical ratios were necessary if the district judges were to do the job given them.³⁷³ On appeal to the Supreme Court, the Justices agreed with this view.³⁷⁴ "The modifications ordered by the panel of the Court of Appeals, while of course not intended to do so, would, we think, take from the order some of its capacity to expedite, by means of specific commands, the day when a completely unified, unitary, nondiscriminatory school system becomes a reality instead of a hope. We believe it best to leave Judge Johnson's order as written rather than as modified by the 2-1 panel."³⁷⁵

Things were a little more complicated when the issue moved from teachers to students. It was not that the constitutional issues were significantly different, but that the practical problems in moving students was simply so much greater than that for faculty. Consider the practical problems posed in the case of *Swann v. Charlotte-*

³⁶⁷ Carr v. Montgomery County Bd. of Educ., 400 F.2d 1, 9 (5th Cir. 1968).

³⁶⁸ *Id.* at 5-7.

³⁶⁹ *Id.*

³⁷⁰ The first opinion from the Fifth Circuit involved a panel of only three judges, one of whom objected to the views of the others. *Carr*, 400 F.2d at 1. Judge Brown's comments are made in regards to a motion for the entire Fifth Circuit to hear the case *en banc*, a motion subsequently denied by a majority of the Court's members. *Montgomery County Bd. of Educ. v. Carr*, 402 F. 2d 782 (5th Cir. 1968).

³⁷¹ *Carr*, 402 F. 2d. at 785.

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225, 235-37 (1969).

³⁷⁵ *Id.* at 235.

Mecklenburg Board of Education.³⁷⁶ The difficulty was two-fold. First, there was the intransigence of the school board. In 1965 when this case was first filed, of the 20,000 black students in the district, only 490 attended schools with whites, and most of those (80%) were in one school with seven white pupils.³⁷⁷ When asked to fix this problem, the school board, in common with many boards in the south at this time, chose to implement a freedom-of-choice plan in which students could transfer into any school they wished so long as they provided their own transportation.³⁷⁸ By the time things came to a head in a 1970 hearing, only some 14,000 of the now 24,000 black students attended integrated schools (this out of a total population of 84,000 students).³⁷⁹ The Board refused to go any further; its members felt they had done enough to meet the court's demands, and enough was enough.³⁸⁰ As one of the Board's attorneys put it, "We truly felt that this school system had done what complied with the constitutional mandates."³⁸¹ The result was obstructionism and delay.

Even more troubling were the problems posed by the districts size. In 1960, as a cost saving measure, city and county officials merged the Charlotte city and Mecklenburg county schools into a single district. Spanning twenty-two miles east-west, and thirty-six miles north-south, the district encompassed some 550 square miles.³⁸² Mere size was not the only problem, however. Adding difficulties was the fact that students were not evenly distributed across the district.³⁸³ Most blacks lived in the city, while whites were spread out across the city and county.³⁸⁴ Any integration plan was going to have to figure out a way of moving these bodies, or creating a truly unitary system would be an impossibility. Moving students between schools, in fact, had been one of the key problems with the freedom-of-choice plan in place at this time.³⁸⁵

As noted above, faced with the boards constant refusal to act on their own, Judge James McMillan appointed a receiver, Dr. John A. Finger, to come up with an effective integration plan.³⁸⁶ Dr. Finger's response to the problems in this case was a mix of the

³⁷⁶ 311 F. Supp. 265 (W.D. N.C. 1970), *vacated*, 431 F. 2d 138 (4th Cir. 1970), *aff'd in part*, 402 U.S. 1 (1971).

³⁷⁷ *Swann*, 402 U.S. at 6-7; *see also* SCHWARTZ, *supra* note 317, at 14-18.

³⁷⁸ *Swann*, 402 U.S. at 13.

³⁷⁹ *Id.* at 7.

³⁸⁰ *Id.* at 7-11; SCHWARTZ, *supra* note 317, at 14-18 (describing the School Board's views).

³⁸¹ SCHWARTZ, *supra* note 317, at 14.

³⁸² For details of the school district see *Swann*, 402 U.S. at 6-7.

³⁸³ *Id.* at 6.

³⁸⁴ *Id.*

³⁸⁵ *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 306 F. Supp. 1299, 1304-05 (W.D. N.C. 1969).

³⁸⁶ A consultant will be designated by the court to prepare immediately plans and recommendations to the court for desegregation of the schools. The legal and practical

familiar and inventive. In response to the Board's intransigence and the concurrent problem of how to mix the student population to achieve racial parity, Finger chose to utilize cluster attendance zones, school pairing and the application of race based ratios.³⁸⁷ Cluster zones and school pairing were two related methods for promoting integration. Under such plans, districts would be divided into attendance zones based on the racial make-up of the region. Particular zones (and schools within zones) would then be paired together and the students of different races shifted between the schools to effectively mix the races. Mixing could occur by grade (e.g. all the zone's students in grades 1-4 would attend one school, while all those in 5-6 would attend the other) or by school (e.g. half the zone's students would attend school A, while half would attend school B).³⁸⁸ In Charlotte, the Finger plan as finally adopted, called at the high school level for the use of attendance zones which were -- as described by the Supreme Court in its ruling in this matter -- "typically shaped like wedges of a pie, extending outward from the center of the city to the suburban and rural areas of the county in order to afford residents of the center city area access to outlying schools."³⁸⁹ As each zone had only one school, the linking of city and rural parts of the county produced between seventeen and thirty-six percent integration.³⁹⁰ At the junior high level, the use of gerrymandered geographic zones was combined with the creation of nine 'satellite' (non-contiguous) zones with "inner-city Negro students . . . assigned by attendance zones to nine outlying predominantly white junior high schools, thereby substantially desegregating every junior high school in the system."³⁹¹ For the district's seventy-six elementary schools, Finger minimized the use geographic zoning, and utilized instead a mix of satellite zoning, school pairing and school grouping to achieve between a nine to thirty-eight percent black presence in the schools.³⁹²

As for the problems of district size and the attendant difficulty in mixing students living great distances away from each other, Dr. Finger chose the then revolutionary method of *mandatory* district-wide busing.³⁹³ Such busing was, in fact, the key to the Finger plan. Cluster/satellite zoning and school pairing could only work if the students could be freely moved between the respective schools. Given the size of the district, and the geographic split between city and county, a district-wide busing plan was a necessity if integration was to be achieved.³⁹⁴ To this end, the Court ordered that

considerations outlined in detail in earlier parts of this opinion and order are for his guidance." *Swann*, 306 F. Supp. at 1313; *see also Swann*, 311 F. Supp at 265 (noting appointment of Dr. Finger to this position).

³⁸⁷ *Swann*, 311 F. Supp at 265 (describing the Finger plan).

³⁸⁸ *Id.*; *see also Swann*, 402 U.S. at 8-9.

³⁸⁹ *Swann*, 402 U.S. at 8.

³⁹⁰ *Id.* at 8.

³⁹¹ *Id.* at 8-9.

³⁹² *Id.* at 9.

³⁹³ *Swann*, 311 F. Supp. at 268.

³⁹⁴ *See WILKINSON, supra* note 2, at 133-139.

“transportation be offered on a uniform non-racial basis to all children whose reassignment to any school is necessary to bring about the reduction of segregation, and who live farther from the school to which they are assigned than the Board determines to be walking distance.”³⁹⁵ The judge acknowledged that under his plan, the district would have to bus as many as 10,000 students per day at a cost of just under forty dollars per student. However, he pointed out that cost was “not a valid legal reason for continued denial of a constitutional right.”³⁹⁶

The final step in the Finger plan was the setting of deadlines and target percentages of racial mixing as a means of judging success.³⁹⁷ In December 1969, Judge McMillan, in an interim order outlining the standards to be used in constructing an integration plan, had directed the school board to make every effort “to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others .”³⁹⁸ He further went on to note “that no school [should] be operated with an all-black or predominantly black student body, [and] that pupils of all grades [should] be assigned in such a way that as nearly as practicable the various schools at various grade levels [had] about the same proportion of black and white students.”³⁹⁹ And, while the Judge acknowledged that variations “from the norm” might be “unavoidable,” he stressed that the results of any integration plan should come as close to these ratios as possible.⁴⁰⁰ Two months later in his final decree imposing the Finger plan, the judge ordered that the plan be fully implemented by May 4th, 1970.⁴⁰¹ After that date, the school board was to “adopt and implement a continuing program, computerized or otherwise, of assigning pupil and teachers during the school year as well as at the start of each year for the conscious purpose of maintaining each school . . . in a condition of desegregation.”⁴⁰²

Subsequently appealed to the Fourth Circuit and the Supreme Court, *Swann* joined *Brown*⁴⁰³ and *Green*⁴⁰⁴ in redefining policy on desegregation. The school board challenged the Finger plan’s use of racial quotas, extreme gerrymandering of attendance zones and busing, as well as the requirement that every school to be desegregated to create a unitary district.⁴⁰⁵ On every count, the Supreme Court upheld Judge

³⁹⁵ *Swann*, 311 F. Supp at 268.

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 267-69.

³⁹⁸ *Id.* at 267-68.

³⁹⁹ *Id.* at 268.

⁴⁰⁰ *Swann*, 402 U.S. at 23-24.

⁴⁰¹ *Swann*, 311 F. Supp at 269-70.

⁴⁰² *Id.* at 269.

⁴⁰³ *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

⁴⁰⁴ *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

⁴⁰⁵ *Swann*, 402 U.S. at 9-10.

1999]

FROM RIGHTS TO RESOURCES

McMillan.⁴⁰⁶ On the issue of racial quotas, for example, the Court noted that an “awareness of the racial composition of the whole school system [was] likely to be a useful starting point in shaping a remedy to correct past constitutional violations.”⁴⁰⁷ It therefore concluded that the use of “mathematical ratios” as a “starting point” -- though not necessarily as an “inflexible requirement” -- was within the “equitable remedial discretion of the District Court.”⁴⁰⁸ As to the “sometimes drastic” gerrymandering of attendance zones into forms that were “neither compact nor contiguous,” the Court also held that, as an “interim corrective measure” gerrymandering was within the District Court’s remedial powers.⁴⁰⁹

All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that had been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.⁴¹⁰

The Justices thus held that “in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority’s compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition.”⁴¹¹ Where a school board’s integration plan allowed for the continuation of single-race schools, “the burden of showing that such school assignments are genuinely nondiscriminatory” rested with the school board.⁴¹² The same logic held for the implementation of mandatory busing. In as much as “busing had been an integral part of public education for years” (in the 1969-70 school year some 39% of all students nationwide were bused) it was up to the school board to show that the District Court’s use of busing to integrate the schools posed an unacceptable risk to the health or education of the child.⁴¹³ Failing this, District Judges were well within their rights to order mandatory busing.⁴¹⁴

The impact of the Supreme Court’s decision in *Swann* was electric. It gave

⁴⁰⁶ *Swann*, 402 U.S. at 1. It should be noted, that the Fourth Circuit upheld Judge McMillan on everything but the assignment of pupils attending elementary schools. *Swann*, 431 F.2d 138, 140 (4th Cir. 1970).

⁴⁰⁷ *Swann*, 402 U.S. at 25.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at 27.

⁴¹⁰ *Id.* at 28.

⁴¹¹ *Id.* at 26.

⁴¹² *Id.*

⁴¹³ *Id.* at 29.

⁴¹⁴ *Id.* at 30.

constitutional force to the adoption by District Courts of race-based standards for integration, school pairing and mandatory busing on a wide scale. In the months and years that followed *Swann*, District Courts across the South implemented integration plans that included mathematical ratios, system-wide school pairing and mandatory busing in one form or another. In Corpus Christi, Texas, for example, Judge Woodrow Seals invited the HEW to file a plan which would comply with the recently announced *Swann* requirements.⁴¹⁵ That plan, largely adopted by the Judge, employed a mix of school pairing, restructured attendance zones and busing to solve the nettlesome problem posed by the school district's tri-ethnic makeup (white, black and Hispanic).⁴¹⁶

"From the figures available to the court," the Judge concluded, "it appears that no school at any level will be ethnically identifiable."⁴¹⁷ In doing so, Seals continued, "this plan has a realistic chance of creating a unitary school system," one that caused no "undue economic burden[s]" and would "not disrupt the educational process more than [was] necessary to secure rights guaranteed under the Constitution."⁴¹⁸ The same pattern was followed in Little Rock where, following *Swann*,⁴¹⁹ the Court ordered the school board to create a new integration plan utilizing school pairing and grouping along with mandatory busing so as to "destroy their [the individual schools] former racial identifiability."⁴²⁰ In Jefferson Parish Louisiana, Judge Christenberry, on motion from plaintiffs seeking the application of the *Swann* decision to this case, ordered the school board to draw up a new integration plan, one emphasizing school pairing and revised geographical attendance zones.⁴²¹ He also demanded that the plan must provide for integration of faculty in such a manner that the racial ratio of the faculty in each school match the ratio for the district as a whole.⁴²² Finally, on the troubling issue of busing, the judge was less demanding, suggesting that "while busing is a permissible tool for school desegregation, and undoubtedly will be necessary to some extent . . . busing should be a last-resort remedy."⁴²³

⁴¹⁵ *Cisneros v. Corpus Christi Independent Sch. Dist.*, 330 F. Supp 1377, 1397 (S.D. Tex. 1971).

⁴¹⁶ *Id.* at 1393-97.

⁴¹⁷ *Id.* at 1393.

⁴¹⁸ *Id.* The court's order was appealed to the Fifth Circuit which upheld the plan. *Cisneros v. Corpus Christi Independent Sch. Dist.*, 467 F.2d 142 (5th Cir. 1972). However, a stay of execution was ordered by Justice Black which delayed implementation. *Cisneros*, 404 U.S. 1211, 1211 (1971). After many additional hearings and conflicts, a new plan was ordered by Judge Owen Cox in July, 1975 which utilized a computer to work out a reassignment plan based loosely on the racial makeup of the district as a whole. See Davis, *supra* note 313, at A1.

⁴¹⁹ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

⁴²⁰ *Clark v. Bd. of Dir.*, 328 F. Supp. 1205, 1219 (1971).

⁴²¹ *Dandridge v. Jefferson Parish Sch. Bd.*, 332 F. Supp. 590, 594-95 (E.D. La. 1971).

⁴²² 3 RACE REL. L. SURV. 134, 134-5 (1971) (referring to Judge Christenberry's July 9th order in *Dandridge*).

⁴²³ *Id.*

As Judge Christenberry's orders on busing shows, not all judges embraced the idea of mathematical ratios, system-wide school pairing and especially mandatory bussing. Some agreed with the firm position of Judge William Taylor who, in the Dallas School case, made clear that, "I am opposed to and do not believe in massive cross-town bussing of students for the sole purpose of mixing bodies."⁴²⁴ Many more could agree with Judge Taylor that there were "many other tools at the command of the School Board" to fight segregation than busing.⁴²⁵ Yet these alternate, and presumably less intrusive, methods were also based, on the whole, in a race-based approach to integration. One of the most popular methods for those wishing to minimize the need for cross-town busing was the application of a majority to minority transfer system. An outgrowth of the old freedom-of-choice plans of the early 1960s, and promoted by the Fifth Circuit in its *Jefferson*⁴²⁶ decision, majority to minority plans involved allowing students to transfer to any school they wished, so long as their race was in the *minority* in the new school.⁴²⁷ The idea was that the voluntary movement of students seeking a better education by moving to new schools in which their race was in the minority would provide the necessary push toward integration. Widely adopted as either the sole method of integration or as a part of a wider integration plan,⁴²⁸ the problem with majority to minority plans was that it placed the burden of desegregation largely on minority students. (Experience showed that few whites would voluntarily transfer to a black-majority school).⁴²⁹ These plans also had problems generating enough movement to produce a unitary school system. As the Eight Circuit noted, "while it is true that the majority to minority transfer provision has the potential for alleviating the situation to an extent, it is in large part an illusory remedy."⁴³⁰ Still, many judges liked the majority to

⁴²⁴ *Tasby v. Estes*, 342 F. Supp. 945, 948 (N.D. Tex. 1971), *rev'd in part*, 517 F.2d 92 (5th Cir. 1975).

⁴²⁵ *Id.* It should be noted that after the Supreme Court's decision in *Swann*, Judge Taylor did order limited bussing to achieve integration. *Id.* at 956. However, he continued in his opposition toward school pairing in Dallas, feeling that the "[c]ontiguous pairing or grouping of secondary level schools. . . [w]ould have only produced movement of white students from one school to another or all Black students from one school to another" as a result of the city's segregated residential patterns. *Id.*

⁴²⁶ *United States v. Jefferson County Bd. of Educ.*, 372 F. 2d 836 (5th Cir. 1966).

⁴²⁷ *ARMOR*, *supra* note 58, at 162-63 (describing minority-to-majority transfer plans). For an example of a Freedom-of-Choice plan in action, see ROBERT PRATT, *THE COLOR OF THEIR SKIN* 40-55 (1992).

⁴²⁸ *ARMOR*, *supra* note 58, at 167.

⁴²⁹ In fact, experience showed that where freedom-of-choice type plans existed and formerly all-white schools became increasingly integrated, "many white parents withdrew their children from those schools and enrolled them in other white schools." PRATT, *supra* note 427, at 44. While majority to minority plans ended this practice, it did little to undermine white reluctance to attend black majority schools (and hence, to promote white transfers to black schools).

⁴³⁰ *Clark v. Bd. of Educ.*, 426 F.2d 1035, 1044 (8th Cir. 1970).

minority approach because of its less intrusive effects.⁴³¹

Another popular approach, one usually proposed by those who wished to limit the disruptions associated with integration (and one that was not based on a race-focused application of the courts' power) was the use of neighborhood schools. Under a neighborhood plan, all students living in a residential neighborhood, irrespective of race, would attend the same schools. Often paired with majority to minority efforts, such plans had the advantage of familiarity and moderation. By minimizing the need for busing, it was felt that these plans increased the chances of public (i.e. white) acceptance and thus minimized the risks for white flight.⁴³² Unfortunately, given the prevalence of residential segregation, neighborhood school plans often failed to achieve the goal of integration. This failure made such plans constitutionally suspect.⁴³³ "The neighborhood school concept, no matter how attractive," noted Judge Frank Kaufman of the Maryland District Court, "cannot, at the elementary or any higher level, compel a continued pattern of unconstitutional segregation."⁴³⁴ The standard set by *Green*⁴³⁵ was effectiveness and only effectiveness: did the plan end bi-racial school systems and did it do so "now."⁴³⁶ If the method reinforced segregation rather than promoting desegregation, then that method was unacceptable.⁴³⁷ And while some judges were willing to try neighborhood school plans, most were forced to the unavoidable conclusion that such plans were not adequate remedies.⁴³⁸

The conclusion is clear. No matter what the particular views of the judge on the issue of race mixing and mandatory busing, the application of group-based remedies implicit in the receivership model made the shift to race based quota systems inevitable if the goals set by the Supreme Court were to be met -- a position implicitly accepted by the Supreme Court in its *Swann*⁴³⁹ ruling.⁴⁴⁰ And despite the constant hemming and

⁴³¹ See *Calhoun v. Cook*, 362 F. Supp 1249, 1251 (N.D. Ga. 1973).

⁴³² See *Tasby v. Estes*, 342 F. Supp. 945, 950-51 (N.D. Tex. 1971).

⁴³³ Examples where judges denied plans for neighborhood schools as constitutionally infirm include: *Clark*, 426 F. 2d at 1043; *Cato v. Parham*, 297 F. Supp. 403, 410 (E.D. Ark. 1969); *Vaughns v. Board of Educ.*, 355 F. Supp 1034, 1035-36 (D. Md. 1972). It is interesting to note, however, that the Supreme Court never embraced the model that residential segregation resulting in dual school districts mandates such reactions as school busing. In fact, the High Court "has never permitted the use of housing segregation as the sole basis for a school desegregation remedy." *ARMOR*, *supra* note 58, at 10.

⁴³⁴ *Vaughns*, 355 F. Supp at 1050.

⁴³⁵ *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

⁴³⁶ *Id.* at 439.

⁴³⁷ *Id.*; *WILKINSON*, *supra* note 2, at 116; *KULL*, *supra* note 4, at 194.

⁴³⁸ *Clark*, 426 F.2d at 1043; *Cato*, 297 F. Supp at 410; *Vaughns*, 355 F. Supp at 1050.

⁴³⁹ *Swann v. Board of Educ.*, 402 U.S. 1 (1971).

⁴⁴⁰ By accepting Judge McMillan's busing order, the Court logically had to accept its underlying race based quota standards of judging success or failure to achieve a unitary school district. However, this acceptance was only *implicit*. As Kull notes, even while they

1999]

FROM RIGHTS TO RESOURCES

hawing about only requiring “approximate” ratios, the plans that came out of the district courts were based primarily on the application of race membership to school placement.

Even where the judge disliked the group oriented nature of such plans, they had few options available if they were to fulfill their constitutional duty. Once the decision had been made to apply the enforcement tools created to serve bankruptcy receiverships to desegregation matters, the shift to “benign racial sorting” was soon to follow.

5. Conclusion

By 1974 the application of the receivership model to southern school desegregation was largely complete. The years that followed would see a maturation of this practice, both in terms of its shift to the North and in its continued application in the South. Even in the face of Supreme Court indecision, and even retreat, on this issue,⁴⁴¹ the general components of the receivership model (the retention of jurisdiction, the use of experts, mandatory injunctions and sweeping decrees, and a general group-focus to implemented remedies) remained strong. It simply was too useful a tool if any integration were to be achieved. For, in applying the familiar components of the equity receivership, district judges could overcome the practical dilemmas posed by popular opposition to integration.

None of this is to say that the civil rights receivership was *exactly* the same as the economic receiverships of the past; there were significant differences in focus and scope between the two processes.⁴⁴² However, the old model provided a template for the new procedures, and with it, a conceptual framework that set outer parameters of available action. More importantly, it gave judges a lead on how to handle the overwhelming pressures that immediate integration posed. Once this “lead” was discovered, judges experimented with the process in response to actual enforcement difficulties. The result was both similar and different to that of earlier cases.

The effect of this use of traditional equity procedures was a radical expansion of the

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a district judge who had taken a courageous stand on what he thought to be the implications of *Green*, [the justices] could not -- at least without provoking dissent - enjoy the district judge's freedom to explain and justify the course the law was taking. The opinions for the Supreme Court, in *Swann* and every major desegregation case that followed, refused to acknowledge that the ‘rules of the game’ had changed since *Brown* in any respect other than the timetable for compliance. They accordingly offered no justification for the different constitutional rules that were now being enforced by the district courts.

KULL, *supra* note 4, at 196-97.

⁴⁴¹ *Keyes v. Denver Sch. Dist.*, 413 U.S. 189 (1973); *Milliken v. Bradley*, 418 U.S. 717 (1974); *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978).

⁴⁴² *See Kirp & Babcock, supra* note 334, at 316-17.

influence of the federal courts. From busing to orders for remedial education to decrees for new construction and beyond, the impact was explosive. The federal courts, notes Mark Chadsey in his recent study of the federal courts and southern school desegregation, “played a significant . . . role . . . as the creators of nearly all legal standards governing school desegregation.” In fact, “between 1969 and 1973, the federal courts, acting alone, increased the number of desegregated black school children to over 90 percent.”⁴⁴³ Thus, though other forces were at work promoting change (Civil Rights Act of 1964, HEW), it was the federal courts that ultimately shaped the desegregation process: setting standards, promoting methods, integrating the efforts of other agencies, and ultimately, judging success or failure. And it was the district judges who carried out most of this movement as they experimented to find answers to the many practical issues raised by integration. In the process, these judges constructed a set of enforcement procedures and methods which, once adopted, made the shift to a group-based, results oriented jurisprudence in the schools and other civil rights matters, if not inevitable, hard to stop. The result was the expansion of this new model of civil rights across society, and with it, a revolution in rights whose effects are still felt today.

⁴⁴³ Chadsey, *supra* note 245, at 218.